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Feb. 2, 2004

Steve Spangle, Field Supervisor
Arizona Ecological Services Office
U.S. Fish & Wildlife Service
2321 West Royal Palm Road, Suite 103
Phoenix, AZ 85021

Dear Mr. Spangle,

Please accept the following comments on redesignation of critical habitat for the highly endangered southwestern willow flycatcher. Critical habitat is absolutely necessary to ensure the survival and recovery of the flycatcher and should include: CH2

* All presently or recently occupied flycatcher habitat, including those areas protected by conservation plans or other measures. Critical habitat adds protection even in cases where there is some existing protection.

* Sufficient habitat to allow recovery of flycatchers to a wider and more viable portion of their historic range, prioritizing areas within 50 miles of existing territories, which is close to the observed maximum dispersal distance of a flycatcher between breeding populations, followed by areas that would reconnect existing populations across the landscape. HE1

* Designated critical habitat should encompass a minimum of the 100-year floodplain.

* Constituent elements of critical habitat should include riparian vegetation utilized by the flycatcher, as well as the aquatic environment, which is a primary source of insect prey for the flycatcher, and the streambanks that provide a necessary structural component supporting flycatcher habitat.

Thank you for taking time to consider thess comments.

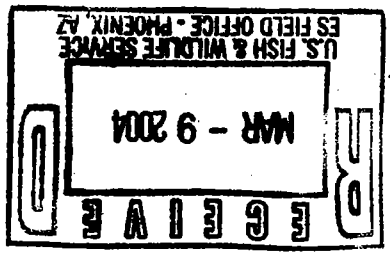
Sincerely,

Anna Harlowe

Anna Harlowe
Issues coordinator

WESTERN URBAN WATER COALITION

"For the Future of the West"



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March 8, 2004

Mr. Steve Spangle
Field Supervisor
Arizona Ecological Services Office
U.S. Fish and Wildlife Service
2321 West Royal Palm Road, Suite 103
Phoenix Arizona 85021

Re: Scoping Comments on Southwestern Willow Flycatcher Critical Habitat Proposal

Dear Mr. Spangle:

The U.S. Fish and Wildlife Service (FWS) has published notice requesting scoping comments on the proposed designation of critical habitat for the southwestern willow flycatcher (SWF). FWS will issue an environmental impact review document on the forthcoming prepared designation as required by the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 et seq. These comments are submitted by the Western Urban Water Coalition (WUWC).

The WUWC consists of the largest urban water utilities in the West, serving over 35 million western water consumers in 15 metropolitan areas in six states, including major urban areas of California. The WUWC represents the following urban water utilities: Arizona – Central Arizona Project, City of Phoenix, City of Tucson; California - East Bay Municipal Utility District, Metropolitan Water District of Southern California, San Diego County Water Authority, City and County of San Francisco Public Utility Commission, Santa Clara Valley Water District; Colorado - Denver Water Department, City of Aurora; Nevada - Las Vegas Valley Water District, Southern Nevada Water Authority, Truckee Meadows Water Authority; Utah - Central Utah Water Conservancy District; and Washington - City of Seattle.

Several WUWC members would be affected by designation of critical habitat for the SWF. Such a designation could adversely affect the water supply operations of WUWC members such as the Central Arizona Project, City of Phoenix, City of Tucson, Metropolitan Water District of Southern California, San Diego County Water

W25

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Authority, Southern Nevada Water Authority, and others, all of whom draw their municipal water supply from dams and related facilities within the range of the SWF. These entities would have their municipal water supply activities significantly curtailed and costs of operations significantly increased if the activities called for in the draft plan are implemented. W25

The WUWC supports appropriate measures to achieve recovery of the SWF, including an appropriately defined critical habitat designation. Indeed, many WUWC members already are engaged in SWF programs, some of which are related to recovery and habitat protection. For example, the Southern Nevada Water Authority is working cooperatively with the Bureau of Reclamation and the Nevada Division of Wildlife to fund and carry out research related to this species, including population surveys. Another example is the extensive commitment of the City of Phoenix to address SWF issues associated with the Roosevelt Dam. W25

The reconsideration of critical habitat for the SWF presents an important opportunity for FWS to undertake a through and balanced examination ~~of the~~ under section 4 of the Endangered Species Act. 16 U.S.C. §1533. The designation of critical habitat for this species has been embroiled in extensive litigation, including the invalidation of the previous designation. The U.S. Fish and Wildlife Service (FWS) first listed the SWF as an endangered species in 1995 as a result of litigation. More recent lawsuits have contested the ESA requirements associated with critical habitat for this species. In response to Court orders: 1) FWS designated critical habitat for the SWF in 1994; 2) the designation was invalidated in 2001; and 3) FWS is now in the process of formulating a new designation proposal. W25

As the courts have now held, such designation must account not only for essential biological features but also economic consideration. Under section 4(b)(2) of the ESA, areas may be excluded from designation if, after considering "the economic impact, and any other relevant impact" the Secretary determines that the benefits of excluding the area outweigh the benefits of designation. Id. § 1533(b)(2). The WUWC believes that, if these factors are applied properly, a reasonable and well-considered designation should result that balances species conservation with economic impacts and avoids over-designation. E32

These comments are submitted solely for scoping purposes under NEPA. As a result, they are intended only to identify issues that should be considered by FWS in preparing an environmental analysis of the impacts of the designation. The WUWC E32

will comment on the area that should be subject to designation, and the manner in which biological and economic considerations should be accounted for, in response to a proposed rule. E32

In submitting these comments, the WUWC requests that FWS fully discharge its duty to consider economic impacts under both NEPA and ESA. For purposes of complying with NEPA, economic impacts must be fully identified and analyzed. this requirement applies to critical habitat designations. See Catron County v. U.S. Fish and Wildlife, 75 F. 3d 1429 (10th Cir. 1996). E32

The CEQ NEPA regulations explicitly deal with the consideration of economic impacts in EISs. The regulations provide that the term "human environment" refers to "the natural and physical environment and the relationship of people with that environment." 40 C.F.R. § 1508.14. Under NEPA, the action agency must consider both the direct and indirect effects caused by the action, including "cultural, economic, social, or health" effects. Id. § 1508.8. Such effects for NEPA analysis must be traceable to the impact the federal action will have on "the natural and physical environment and the relationship of people." Id. § 1508.14. See also State of Louisiana v. Lee, 758 F.2d 1081, 1084 (5th Cir. 1985), cert. den., 475 U.S. 1044 (1986) (explaining that "[a]n environmental impact statement is intended to detail the environmental and economic effects of any proposed Federal action so that those not directly involved can understand and give meaningful consideration to and make appropriate comment on the factors involved." E46

In addition, the ESA requires that economics be taken into account. The Courts have determined that FWS must undertake a meaningful analysis of economic impacts, and cannot rely upon the so-called "incremental" approach, which attributes all costs of designation to the listing of a species. New Mexico Cattle Growers Association v. U.S. Fish and Wildlife Serv., 248 F.3d 1277 (10th Cir. 2001). This requirement is one "of obligation rather than discretion." Bennett v. Spear, 520 U.S. 154, 172 (1997). E46

To assist FSW in fulfilling these duties, the WUWC has developed recommended principles that should be applied when making critical habitat designations. Enclosed with these comments is a briefing paper that sets forth the best available methodology for taking economics into account in making a critical habitat determination. The WUWC requests that FWS abide by these principles when developing the flycatcher proposed designation. As discussed in the WUWC position paper, FWS should apply five basic principles to the analysis of economic impacts: 1) recognize that not all E46

habitat is not equally important to species conservation, and delineate and rank habitat based on whether it contains attributes that are essential to species conservation; 2) define the special management measures that are necessary if habitat areas are to be designated; 3) apply a cost-effectiveness approach to balancing the benefits of exclusions against those of inclusion of particular areas; 4) consider local and regional impacts, including near-term impacts, in analyzing economic costs and avoid the tendency to use only a national accounting stance; and 5) avoid attempting to monetize the biological value of habitat areas, because monetary values generally cannot be assigned for this purpose. These principles are described in greater detail in the enclosed briefing paper. E46

Economic factors are especially important when a critical habitat designation has the potential to affect urban water supply operations. The following requirements, e.g., can have significant economic impacts on a utility: 1) limiting reservoir capacity to avoid impacts on designated habitat, even if it is of marginal biological value; 2) requiring the spillage of otherwise stored and utilized water; 3) restricting access to facilities and water sources; 4) requiring the purchase of replacement water and greatly increase cost; 5) disrupting established water contracts and water rights; and other factors. The WUWC requests that all of these impacts be considered as a result of SWF designation throughout the entire range under consideration for possible designation. These costs should be carefully balanced against the biological value of the affected areas to determine a balanced approach to designation where areas of high economic cost and low or moderate biological benefit are excluded. W26

In addition to ensuring proper analysis of environmental impacts, the WUWC requests that the following issues be addressed in the NEPA review.

1. Need for EIS. The WUWC believes that an EIS should be prepared. Clearly, the designation of critical habitat is likely to have significant impacts, based on economic consequences alone. Environmental impacts also are likely to be significant, based on the effect of such designation on species' conservation and adverse environmental effects that could result if activities that are restricted or prohibited in designated habitat are forced to occur in other locations. FWS should avoid the time and cost that will be lost in preparing an EA, only to determine later that an EIS is needed. If FWS commits to an EIS now, and proceeds efficiently, it should be possible to complete the required review by the court-imposed deadline of September 2005. PR32

2. Designation Independent of Recovery Plan. FWS has an independent duty to evaluate critical habitat that is distinguishable from areas considered desirable or important to a species under a recovery plan. Different standards apply. In particular, FWS is required to exclude areas from critical habitat where adverse economic impacts exceed conservation benefits and when special management considerations are present. These additional factors, that were not considered in developing the recovering plan, are likely to figure prominently in the designation of critical habitat for this species. The economic impacts are likely to be substantial in certain cases; a variety of special management considerations exist; and some areas identified in the recovery plan are of marginal conservation value.

CH05

3. Alternatives. NEPA requires consideration of all reasonable alternatives. In the case of this proposed action, FWS must recognize the range of alternatives that reflect the variation in the biological and physical features that occur across the extensive geographic area under consideration for possible designation. FWS must avoid relying upon generic findings or overly-broad assumptions, such as the unsupported conclusion that the extent of 100 year floodplain should be relied upon as the basis for designation discrimination analysis that looks carefully at the relationship between high value riparian habitat and stream geomorphology within the 100 year floodplain is required. For example, many areas within the 100-year floodplain are incapable of serving as habitat for the SWF because they do not support the appropriate vegetative growth. Such areas should be excluded. The alternatives presented in the NEPA review document should be based upon an analysis that follows this kind of critical detailed, and site-specific analysis.

PR55

4. The Entire Range Cannot Be Designated. The ESA makes it clear that "[e]xcept in those circumstances determined by the Secretary, critical habitat shall not include the entire geographical area which can be occupied by" the species. 16 U.S.C. § 1532(5)(c). Thus, a designation should not include unoccupied habitat unless it is determined to be essential for species conservation. FWS should carefully evaluate the area under consideration and ensure that unoccupied habitat is not designated unless strong justification to include it based upon documented and essential biological needs.

CH7

5. Exclusion of HCP and Similar Areas. The definition of critical habitat requires the presence of special management considerations. Id. §1532(5). FWS has recognized that areas subject to habitat conservation plans (HCP) do not present such

PR28

needs because the existence of such plans eliminates the need for further protections under critical habitat designation. In addition to HCPs, other forms of conservation-oriented initiatives can meet the same objective and call for deleting those areas from designation. As stated above, WUWC members are engaged in a variety of SWF conservation initiatives, including existing and anticipated HCPs, and such areas should be deleted from any proposed designation. PR28

The WUWC appreciates the opportunity to submit these scoping comments. We look forward to working with FWS to develop an approach to critical habitat designation that addresses the conservation needs of the species without presenting unnecessary adverse economic or other impacts. Thank you for considering these comments. If you have any questions, please contact me or Donald C. Baur.

Very truly yours,

Guy R. Martin
National Counsel

WESTERN URBAN WATER COALITION
"For the Future of the West"

Position Paper
Administrative Reform of Endangered Species Act

A Recommended Method for Economic Analysis For Critical Habitat Designation Under The Endangered Species Act

Introduction

When a species of fish or wildlife is listed under the Endangered Species Act ("ESA"), the U.S. Fish and Wildlife Service and the National Marine Fisheries Service (collectively, "the Services") are required to designate "critical habitat" for the species. The ESA defines critical habitat as "specific areas . . . on which are found those physical or biological features" that are "(I) essential to the conservation of the species and (II) which may require special management considerations or protection." The ESA also requires that the Services weigh the economic costs of critical habitat designation against the benefits of species conservation before making a final determination.

This whitepaper describes and recommends a method for weighing the economic costs of critical habitat designation against the benefits of habitat protection for species conservation. It is grounded in a belief that economists should focus their analysis on giving policymakers the input they need to make sound decisions in accordance with the law.

1. A cost-effectiveness approach is the appropriate framework of economic science for weighing the economic costs and benefits of critical habitat designation.

The Services should employ a cost-effectiveness framework that is designed to find the least-cost means to achieving the ESA-mandated objective of designating and protecting habitat that is essential for species conservation. A cost-effectiveness framework is practical because it accepts the statutory objective of protecting habitat essential for species conservation and focuses limited analytical resources on estimating the costs of including specific geographic areas for special management within the designation. The costs for each habitat area can then be compared to the biological value of the habitat to arrive at a designation of critical habitat areas that protects the most essential habitat while minimizing economic costs.

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2. Agency biologists should determine the biological value of specific habitat areas for the conservation of the species.

Biologists – not economists – should decide which habitat and physical/ biological elements of that habitat have the most biological value for species conservation and what special management measures are needed to conserve species beyond those measures necessary to prevent jeopardy to, and likely extinction of, a species. When biologists make these distinctions, economists can provide meaningful cost-estimates for comparison with the biological benefits of protecting critical habitat in a particular area.

3. Economists can estimate the direct and indirect economic costs of critical habitat designation for specific geographic areas and standards for habitat protection.

Economists have several tools that can be used to estimate the economic costs of critical habitat designation. Some tools are simple to apply, require little data, and can be employed to quickly provide information on the direct economic costs of critical habitat designation. Other tools, such as input-output analysis, involve complex modeling and additional data, but provide a richer analysis of the direct and indirect costs of habitat protection for a particular region or industry.

The Services should be afforded some flexibility in choosing the economic tool that is most appropriate for each designation. The more complicated economic models should be used to analyze designations of large geographic areas and areas where economic activity is concentrated. The simple, direct-cost method should be used where designations are small in area or there is little variation in the type of land use and economic activity throughout the proposed designation.

4. Use a practical approach for weighing the costs of critical habitat designation against the benefits of critical habitat protection.

Under the recommended cost-effectiveness framework, the Services are provided with information on the relative costs and benefits for designating or excluding specific geographic areas from habitat designation. Areas that have high habitat value and low economic cost will usually be included. Areas that are low in habitat value, but high in economic cost should be excluded. And, if high habitat value – low cost areas do not provide enough habitat for the conservation of the species, then the Services can consider including high, value-high cost areas, or low, value-low cost areas to achieve species conservation objectives.

Discussion

When a species of fish or wildlife is listed under the ESA, the Services are required to designate "critical habitat" for the species. The ESA defines critical habitat as "specific areas . . . on which are found those physical or biological features" that are "(I) essential to the conservation of the species and (II) which may require special management considerations or protection."[1] The ESA also requires that the Services weigh the economic costs of critical habitat designation against the benefits of species conservation before making a final determination.[2]

This whitepaper describes and recommends a method for weighing the economic costs of critical habitat designation against the benefits of habitat protection for species conservation.

I. How Does The Science Of Economics Approach A Problem Like The Economic Costs Of Critical Habitat Designation?

The discipline of economics provides several different analytical frameworks to address the economic costs of a specific project or proposal. The utility of each framework depends on the type of economic question being asked.

Efforts to affect government policies and projects based on anticipated economic effects have a long history. For example, federal water projects frequently were the subject of such analysis. Beginning in the early 1960s, the U.S. Water Resources Council ("WRC") sought to codify an appropriate methodology for estimating water project costs and benefits. Evolving from this process, the WRC Principles and Guidelines (1983) standardized water project evaluation.

Under the National Environmental Policy Act, many federal actions and policies, not just federal water projects, require environmental impact statements that generally include estimates of the economic impacts. Often the economic methodologies

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[1] 16 U.S.C. § 1532(5).

[2] The ESA requires that the critical habitat determination be based on the best scientific and commercial data available and take into account probable economic impacts. 16 U.S.C. § 1533(b)(2); 50 C.F.R. § 424.12(a); see also, New Mexico Cattle Growers Ass'n v. U.S. Fish & Wildlife Serv., 248 F.3d 1277 (10th Cir. 2001) (requiring analysis of economic impacts of critical habitat designation).

codified in the WRC Principles and Guidelines are used as a template for the economic analysis in an Environmental Impact Statement.

In 1978, the ESA was amended to require that economic effects be considered in the designation of critical habitat. The Safe Drinking Water Act Reauthorization introduced the concept of cost/benefit analysis in a realistic framework that exists as a model today. The lessons learned from previous attempts to apply economic analysis to government decision-making should also be taken into account in developing an economic methodology for critical habitat designation.

A. Alternative Accounting Frameworks for Economic Analysis

Among the first questions that must be answered before the economic impacts of critical habitat designation decisions can be estimated is "impacts to whom?" While the question could be framed in several ways, such as impacts to particularly important regional economic sectors, the question is usually framed in terms of impacts on particular geographic units or areas. The WRC Principles and Guidelines identify two alternative economic accounting frameworks that should be used to analyze the impacts of alternative actions or projects: National Economic Development ("NED") and Regional Economic Development ("RED").

1. National Economic Development

The NED accounting framework views the impacts of a project from the perspective of the entire United States. The question posed is: "Does the project actually result in a net change in the economic activity of the nation? By how much does it increase or decrease the amount of goods and services produced in the country?"

When the WRC formulated the Principles and Guidelines, it gave the NED perspective a dominant role in framing the economic impacts of water projects. In that context, the persuasive underlying economic assumptions of NED made sense. The big water projects under consideration in the 1930s through 1960s were to be paid for mostly with federal dollars, and were being justified by the assertion that they would be good for the economic development of the entire country.

In the context of today's critical habitat issues, it is much less clear that the NED criteria should dominate economic analysis. Congress preempted the NED criteria when it passed the ESA – implicitly concluding that the national "benefits to whomsoever they shall accrue" of preserving endangered species always exceed the costs of such preservation. This means that the NED benefits that are directly attributable to the decision to list and preserve the species are largely irrelevant to the cost of critical habitat designation.

Misapplication of the NED framework could lead to costly analysis of issues that are irrelevant to the designation of critical habitat. For example, because several recent analyses mixed listing and critical habitat issues, they were led unnecessarily into such NED benefit considerations such as existence values, recreation benefits, and quality of life. A full NED accounting would be appropriate if the policy question were whether it is in the national interest to conserve a species that qualifies for listing under the ESA, but Congress has already made that decision. In a NED framework, all of the economic impacts of species conservation are a consequence of the listing decision, but those impacts cannot be considered in the listing decision. The ESA presumes that the national benefits of conserving listed species will always exceed the costs of critical habitat designation. That is why the ESA requires critical habitat designation for listed species. The possible exception to the above is for NED effects that are incidental to the designation of particular tracts or attributes of critical habitat. If adding critical habitat designation on top of the protections already provided to an endangered or threatened species either makes possible some economic activity in the designated area or precludes some economic activity in the area, then this could have NED consequences. In most cases however, such NED effects will be mitigated by the national economy's ability to adjust to changes in one sector or geographic area, and any net impacts will be so small that they approach insignificance in the US economy.

If a critical habitat designation just moves economic activity around, impacting some sectors or places but producing offsetting effects elsewhere as the larger economy adjusts, then the designation has no NED effect. Given that the national economy reasonably approximates a general equilibrium system, where most inputs and outputs are mobile, and impacts to one sector or place are transferred to other sectors or places, it is common for project or policy impacts to a sector or region to mostly wash out from the NED perspective. For example, if an action eliminates 100 jobs, and the displaced workers find equally productive work elsewhere, then the net NED impact would be properly estimated as zero. For all of these reasons, the NED accounting framework is of little practical value to the decision-making process for critical habitat designation.

2. Regional Economic Development

Rather than NED, most of the economic and policy issues surrounding the designation of critical habitat relate to the Regional Economic Development (RED) accounting framework. Under this approach, the regional, local, and near-term impacts matter for a full social accounting of who is impacted.

Congress explicitly opened the door for economic analysis of critical habitat designation decisions, and the courts have reinforced this directive, saying that the Secretary must "weigh the benefits of exclusion against those of inclusion of particular areas within the designated habitat."[3] While such "weighing" might have a NED component, it is much more likely that these benefits or costs will be regional or local.

The RED accounting framework could potentially be focused at several possible regional levels. One could look at the economic consequences of critical habitat designation at a state level; at the level of a sub-state region, perhaps counties; or at a very local level, perhaps even at the level of specific firms or property owners. Economic analysis could also conceptualize these regional consequences as affecting particular industries, economic sectors, or other groups of particular concern.

> **Recommendation: To be useful to the critical habitat decision-making process, economic analysis should focus on the regional economic effects of such designations.**

It is these kinds of regional consequences that are really important to the decision-making process for critical habitat designation. The NED effects of designation will almost always be minor, but what really matters is if there is a region, an industry, or a firm that is likely to be substantially damaged or substantially benefited by the inclusion or exclusion of specific geographic areas from critical habitat designation.

B. Alternative Ways of Conceptualizing the Role of Costs and Benefits

Given that attention should be focused on the RED accounting framework when we evaluate the designation of critical habitat, what does this imply about the relevant economic methodology? There are two main ways to conceptualize the economic analysis appropriate to this setting.

1. Cost-Effectiveness Analysis

When a specific project outcome or project budget is predetermined, alternative project designs or elements may be considered using cost-effectiveness analysis. A cost-effectiveness analysis identifies the least-cost method for providing a given level of output, where the output is specified in non-monetary terms, e.g. biological improvements. Cost-effectiveness analysis can identify the lowest cost project

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[3] Catron County Bd. of Comm'rs v. U.S. Fish and Wildlife Serv., 75 F.3d 1429, 1435 (10th Cir. 1996).

elements that meet a given standard. If there are alternative menus of project elements each with an equal chance of meeting the standards, the decision is simple – choose the least costly alternative.

2. Benefit-Cost Analysis

A benefit-cost analysis includes the full cost analysis and devotes equal attention to quantification of project benefits. Benefits reflect the increased value of market goods and non-market recreational, esthetic, and cultural values attributable to a project. Benefit-cost analysis is commonly summarized in the form of a benefit-cost ratio, with a ratio of greater than one signaling the economic feasibility of the project. Successful application of cost-effectiveness or benefit-cost analysis depends upon complete scientific understanding of the underlying processes. Hydrology, river ecology, biology and engineering help us to understand the biological and physical consequences of the alternative actions, economics helps us to understand and quantify some of the human and economic consequences of choosing among the feasible alternatives. If the underlying science is deficient, economic assessment cannot fill the gaps.

> **Recommendation: Cost-Effectiveness Analysis is the appropriate framework for weighing the costs and benefits of critical habitat designation.**

Which of these alternative analytic frameworks is most appropriate for the economic analysis required as a part of the critical habitat designation process? There are several considerations, which, on balance, demonstrate that cost-effectiveness analysis is the preferable approach for critical habitat designation.

The listing decision and the consequent jeopardy standard are intended to assure that the listed species will be protected from extinction. Thus, as stated above any NED and RED benefits that are attributable to the assurance that the species will avoid extinction are a consequence of the listing decision, not the critical habitat designation. Because the purpose of the ESA is to conserve and de-list listed species, the marginal NED and RED benefits of critical habitat designation, above those already conferred by listing, will be small to zero for most species. In other words, the benefits of critical habitat designation are a given under the ESA, which requires such designation for listed species. The critical habitat designation can be considered a delineation of those areas within which the specific obligations and burdens of species conservation will be concentrated.

If the economic benefits of critical habitat designation are small to zero, then the remaining economic decision criterion is the cost of designation for specific geographic areas. If economic analysis is to be useful in deciding what habitat to designate as critical, it must assist in deciding which alternative habitat tracts or elements thereof are the most cost-effective. The resulting designation must be shown to assure the conservation of the listed species. We conclude that cost-effectiveness is the appropriate analytic framework for assessing the economic impacts of critical habitat designation decisions.

This lack of expected benefits from critical habitat designation allows us to sidestep a full-scale cost/benefit analysis. This has several advantages. It considerably reduces the data requirements for the analysis. It eliminates the need to impute economic values for changes in the abundance of the listed species. It avoids the difficult issue of how to measure non-use values (such as the value of knowing that something exists), and non-priced outputs (such as recreation). In other words, if one can adopt the cost-effectiveness framework when estimating the economic impacts of designation for most species, this will considerably reduce the scale and the agency costs of doing such analyses. This approach produces a more reliable assessment of economic impacts associated with designation because the economic consequences of listing, which the ESA does not allow to be considered, are already taken as a given. The result is a true assessment of economic impacts, which occurs within the statutory mandates laid out by the Act.

II. What Is The Role Of Benefits In The Critical Habitat Decision?

It serves no purpose to estimate total economic benefits of critical habitat designation. That would only be useful in a decision whether to designate critical habitat at all based on net benefit, but Congress has already made the determination that species that are threatened or endangered with extinction must be listed and protected through various means, including the designation of critical habitat. Because critical habitat must be designated, the only questions are: (1) What are the physical and biological features of habitat that are essential for the conservation of a species?; (2) Which specific habitat areas contain those elements that are essential for the conservation of the species?; (3) How much of the specific habitat areas containing those elements is essential for the conservation of the species?; and (4) What are the special management measures that would be applied to protect the essential physical and biological features of areas designated as critical habitat? By answering these questions, biologists can delineate the sum total of eligible habitat areas and the relative value of each habitat area as a contribution toward the statutory objective of species conservation.

To implement a cost-effectiveness framework, biologists would delineate and rank-order or score specific habitat segments for their relative value as contributions toward the conservation of the species. A logical basis for delineating and scoring a habitat area would be the quality of physical and biological features that the ESA identifies as criteria for critical habitat designation. In addition, biologists would provide economists with information that differentiates between the level of protection that might be required to avoid jeopardy to the species and the level of protection that would be required to prevent destruction or adverse modification of areas designated as critical habitat. The differentiation between jeopardy and critical habitat protection should be based on special management measures or protection standards that biologists determine to be necessary for the physical or biological features that are essential for the conservation of species. For example, native growth buffers, water temperature, old growth percentages, and other habitat protection measures would be defined in terms of a jeopardy standard and a critical habitat or conservation standard.

Recommendation: The benefits of critical habitat designation should be weighed in biological terms – not economic terms.

For cost-effectiveness analysis, the only relevant benefit is the objective of protecting enough critical habitat for the conservation of the species. Biologists within the federal agencies should delineate and rank-order specific geographic areas as potential critical habitat and identify special management measures or protection standards for the physical and biological features that make habitat "critical."

Under this approach, the primary burden for providing data on the biological objectives and means for achieving those objectives falls on the Services and their biologists. This burden is consistent with the data and decision-making requirements that agency biologists must satisfy in status reviews, listing decisions, critical habitat designation, and recovery planning for species. Moreover, it is in the interest of listed species to differentiate and prioritize habitat segments so that the critical habitat designation and exclusion process is informed by relative biological value as well as costs of protection. However, it is essential that such a ranking be undertaken in an objective manner that avoids the often relied upon practice of simply asserting that all habitat is of "equal value."[4] The need to rank order or score habitat areas according to biological value must be enforced as a cornerstone of cost-effectiveness analysis.

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[4] "Except in those circumstances determined by the Secretary, critical habitat shall not include the entire geographical area which can be occupied by the threatened or endangered species." 16 U.S.C. § 1532(5)(C).

III. How Should The Costs Of Critical Habitat Designation Be Estimated?

Using habitat units and levels of protection provided by biologists, economists can estimate the costs for each unit of critical habitat protection above the baseline of jeopardy protection. The various available economic tools can then be applied to estimate total direct and indirect costs.

As discussed above, economic analysis of critical habitat designation should, in most cases, focus on the RED stance and adopt the cost-effectiveness framework. What does this imply about which of the analytic methodologies available to economists are appropriate tools to estimate these regional costs?

A. Direct Impacts

The direct impacts of designating critical habitat are the immediate consequences to the directly affected individual(s) and business(es) from the designation. The measure of these direct economic impacts is the income lost because of the designation. The estimation of direct impacts is a relatively straightforward application of economic and accounting principles. For example, if the damaged sector is agriculture, the loss of farm income can be estimated using crop or livestock budgets that are usually available from the state Cooperative Extension Service. Budgets can be estimated for other affected sectors drawing on local knowledge, secondary data, or from the sector purchase coefficients of an input-output model estimated for the region.

Note that federal agency section 7 consultation costs are not likely to be direct RED costs. Consultation costs would only affect regional production and spending patterns if they affect the agency's spending patterns in the region. Any added agency spending to support the section 7 consultations would be a stimulus to the economy of the region – not a cost. Conversely, consultation costs incurred by local stakeholders are part of the economic impact and should be included as costs in the direct RED accounting.

B. Secondary Impacts

Secondary economic impacts result as the direct economic effects ripple through the rest of the regional economy. These secondary impacts occur when the directly affected sector(s) would ordinarily buy inputs from other regional businesses (backward linkages) or produce outputs that serve as raw materials for other regional industries (forward linkages). For example, a new irrigation project will cause agriculture to buy more from backward-linked fertilizer, machinery, and insurance sectors, and may allow expansion of forward-linked livestock and food-processing

sectors. Damages to an existing irrigation sector would have opposite effects – business losses in both forward-and backward-linked sectors.

The measure of these secondary impacts is often conceptualized as lost "value added;" the lost wages, rents, and profits that would have accrued to the labor, land, and capital in the regional economy as a result of the primary shock. It is generally held that secondary impacts are small or absent given a national accounting (NED) perspective. The WRC (1983) directed that secondary impacts not be included in NED analyses of federally funded water resources projects unless there is massive national-level unemployment of labor and capital. The logic is that resources employed by a new water project are generally bid away from other productive employment elsewhere in the national economy (the "wash out" assumption).

The WRC Principles and Guidelines do allow secondary impacts to be a part of the RED account of a project analysis – making it possible for the economic analysis to not only estimate the magnitude of the secondary impacts, but to also trace these secondary impacts to other affected sectors of the regional economy.

The direct regional impacts of critical habitat designation will generally be much larger than the secondary impacts, and thus will dominate the critical habitat decision process. The smaller secondary regional impacts will play a lesser role, primarily as they track impacts among the affected sectors. Note that the regional secondary impacts of designating critical habitat will also grow disproportionately smaller for smaller regions. This is because the directly affected people and businesses in a region are more likely to purchase production inputs and consumer goods outside of a smaller region. Spending "leaks" more rapidly from smaller regions.

C. Alternative Regional Economic Models to Estimate Secondary Impacts

For many critical habitat designations, where the proposed designations are small in scale and in remote areas, it may be unnecessary to estimate the secondary regional effects of designation since these will often be small in magnitude and small relative to the direct effects. Note that estimating secondary impacts increases the accuracy of the regional economic impacts, but in many cases adding secondary impacts will not affect the rank order of habitat areas by economic impact. This is because the multipliers will increase each estimate of direct impacts by similar proportions. The exception is where economic uses differ dramatically between different areas of proposed critical habitat and carry with them different income multipliers.

In cases where the secondary impacts are expected to be larger, there are a range of available estimation tools that can be used to estimate these secondary impacts on

regional economic activity and on regional value-added. With the tools now available, estimation of the backward-linked secondary economic impacts to an affected economic region is relatively straightforward.

While input-output models is the tool commonly used to estimate secondary impacts, there are several choices, so the appropriate tool may depend on the scale of analysis justified by the scale of the critical habitat designation. Several alternatives are:

1. Economic Base Models

This method may be justified as a shortcut alternative in economic analysis of quite small-scale critical habitat designations. Economic base analysis begins by identifying the export base sectors of the regional economy (which bring money into the region by exporting goods and services) and the non-basic sectors. The non-basic sectors are viewed as service, support, and local consumption sectors supported by the income generated in the basic sectors. The base ratio is the ratio between these two sector groupings. If a critical habitat designation damages one of the basic sectors, then the base ratio could be used to project a corresponding secondary impact to the non-basic sectors of the regional economy. The virtue of economic base models is that they are relatively cheap, and relatively easy to construct. The downside is lowered accuracy and sectoral detail, but the results may be adequate for small-scale critical habitat designations, where the regional secondary impacts are likely to be small anyway.

2. Input-Output Models

This is the economic modeling tool most commonly used to estimate secondary impacts. The methodology of input-output analysis dates to the 1930s, but has only recently been made available for routine regional impact problems, due to advances in computer technology and the availability of non-survey input-output technique. The IMPLAN database and software package is widely used for applied studies and would be appropriate for analysis of critical habitat designation. In the hands of a practitioner familiar with the IMPLAN software package and the procedures needed to apply it, the cost of an IMPLAN study need be little more than the cost of an economic base study. The IMPLAN study may have the added advantage of being able to provide industry regional purchase coefficients that could be helpful in estimating the direct impacts of the designation.

3. Computable General Equilibrium Models

Input-output models have been criticized for their failure to account fully for the way the economy adjusts to strong impacts. They essentially assume that resources made redundant by some strong impact to the economy are never reemployed by some other

sector or region, and reductions in outputs from the region are never replaced by production from other producers or regions. The following section talks about ways to circumvent this problem of input-output models. The other alternative is to build these relationships into the model – which is the premise of Computable General Equilibrium ("CGE") models. The state-of-the-art for CGE modeling is still time consuming, expensive to construct, and requires special modeling expertise. In a few cases, for large-scale and important designations, a CGE modeling approach may be justified. However, in most cases where the secondary regional impact is expected to be significant to a critical habitat decision, an IMPLAN based input-output model should be adequate for the task.

Recommendation: The choice of model and method depends on the scope of designation and the affected economic landscape.

There is no one right method; rather, the method should be scaled to the designation. Large designations and designations affecting significant concentrations of economic activity may warrant analysis of direct, secondary, and dynamic effects through data-intensive models such as input-output and CGE. Smaller designations may deserve only a direct effects analysis. In some cases, the direct effects analysis may be all that is necessary to compare and decide between the relative costs and benefits of designation for particular habitat segments regardless of indirect economic impacts where the economic value/activity across the various habitat segments is relatively small or comparable. The method used should also reveal the incidence of costs not only by area, but also by economic sector or property owner.

While the ESA does not explicitly require that the incidence of economic costs be considered, a meaningful attempt to weigh benefits against costs should also consider who bears the costs and whether that burden is concentrated on particular interests. These equitable considerations should also inform the critical habitat designation process. Each of the models provides information that decision-makers could use to determine who will bear the costs of protection for critical habitat and whether those who will be hurt by a designation decision could be compensated for their losses.[5] That information could, in turn, be used to design public policies and programs to

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[5] For example, in Tulare Lake Basin Water Storage Dist. v. United States, 49 Fed. Cl. 313 (Fed. Cl. 2001), just compensation was required for owners of water rights whose water delivery contracts were diminished to provide instream flows beneficial to ESA-listed fish species.

ameliorate economic adjustments and dislocations caused by protection for critical habitat.[6]

While the regional direct and secondary impacts of critical habitat designation can be estimated quite easily with techniques such as input-output modeling, translating these impact estimates into estimates of costs is more difficult. Secondary effects expressed as changes in value added are not valid measures of net damages or benefits, primarily because these economic effects are transitory. Moreover, economic impacts as measured in an input-output analysis contain large measures of both benefits and costs in affected sectors. Change in net economic welfare is an appropriate measure of damage (or benefit) from an event. While the precipitating event may indeed ripple along the purchase and sales transactions to impact other businesses in the regional economy, these secondary impacts are generally not permanent because the regional economy will adjust over time. In time, much of the displaced labor will find alternative employment inside or outside the region. Much of the capital will, in time, either move to other uses, or be depreciated. Even land, although immobile, nearly always has some alternative use. Economists call the value of a resource in its next-best alternative use its "opportunity cost." CGE models purport to model this readjustment, but with considerable complexity and cost. An alternative is to compute secondary damages after the displaced resources have been reemployed by subtracting opportunity costs from the estimated secondary impacts. As a rule of thumb, about 80 percent of the secondary impacts are offset by the opportunity costs of the displaced resources reemployed in their next-best alternative, leaving 20 percent of the impacts as damages. This approach can serve as a shortcut in the economic analysis of critical habitat designation – allowing the conversion of regional secondary impacts to regional secondary costs.

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[6] The need for and use of such information is implicit in several policies and programs designed to compensate property owners, businesses, individuals, and communities that are injured by protection for ESA-listed species. For example, in response to the listing of the Northern Spotted Owl and protection for its critical habitat, the Northwest Forest Plan included the Northwest Economic Adjustment Initiative. Over a decade, the Initiative targeted hundreds of millions of dollars in grants-in-aid, loan guarantees, and other programs to assist forest-products dependent communities, workers, and businesses to adjust to economic dislocation caused by protection for the northern spotted owl. Similarly, the nonprofit organization Defenders of Wildlife has created the Bailey Wildlife Foundation Wolf Compensation Trust as a program to compensate ranchers for livestock losses caused by depredation for ESA-listed wolves.

IV. The Exclusion Process: Weighing The Costs Against The Benefits

Under the recommended approach, decision-makers are provided with two key sets of information:

1) Biologists provide a rank-ordered pool of specific geographic areas that are eligible for designation and have been stratified as possessing more or less biological value for the conservation of the species.

2) Economists estimate the economic costs of including each geographic area defined by biologists within the designation of critical habitat, based on the appropriate model choice noted above.

With this information, decision-makers can implement a critical habitat exclusion process by (1) developing alternative configurations of habitat designations that provide equivalent biological benefits and selecting the least-cost alternative or (2) by assigning habitat segments ordinal rankings of biological and cost values and including or excluding areas based on their marginal contributions to total costs and benefits. We do not offer a definitive statement here on the most appropriate method of cost-effectiveness analysis, but we do assert that such an approach is the most meaningful and pragmatic way to fulfill the ESA's requirement that economic costs be considered in the process of critical habitat designation. The examples we offer here can be more fully developed if the Services accept as a first principle the cost-effectiveness approach.

Under the first cost-effectiveness approach, each of the options to be analyzed may be defined as a combination of habitat areas that provides equivalent biological benefits, so that economists may perform a least-cost analysis to select a habitat configuration that achieves conservation objectives but imposes the least cost by excluding areas where higher costs may be avoided.

Under the second cost-effectiveness approach, each habitat area may be analyzed by locating it in a 2x2 matrix that assigns ordinal values for high and low economic costs and high and low biological values. Areas with high costs and low biological values will be good candidates for exclusion. Areas with low economic costs and high biological values will be good candidates for designation. Areas that are low cost and low value may be excluded or included by the Services with less potential for public controversy. Areas that are high cost and high biological value can be intensely debated by the public for inclusion or exclusion. An equivalent method would be to compare habitat areas rank-ordered by biological value and economic impact, and use a triage analysis.

Using a simple matrix and decision-making process such as this will promote meaningful public participation by making the decision process accessible to the lay public. It will focus decision-makers and the interested public on the most important factors in a complicated process. It will also approximate the least-cost analysis method that assumes species conservation as a given objective and minimizes the costs of obtaining that objective.

Recommendations

The Services should develop a detailed framework and methodology for economic analyses of critical habitat designation through public notice and comment, including face-to-face discussions with affected interest groups. The new approach may be embodied in the Services' joint regulations on critical habitat designation, 50 C.F.R. Part 424, or in a formal guidance document. Specifically, the framework and methodology should: 1) eliminate the "incremental" or "baseline" approach and include an exclusion process based on meaningful economic analysis; 2) delineate and prioritize habitat segments based on their relative value in conserving a listed species; 3) use a least-cost or an ordinal ranking cost-effectiveness approach that avoids the monetization of biological benefits, and searches for a critical habitat configuration that satisfies the conservation objective while minimizing costs; 4) require the Services to distinguish between measures necessary to avoid jeopardy and those necessary to conserve the species; 5) calculate the costs of designation using methods and data that are scaled to the scope and impacts of a proposed; 6) use an accounting stance that recognizes localized and regional impacts in the near-term, and that considers direct, indirect and cumulative economic impacts.

Related Literature

Defenders of Wildlife. http://www.defenders.org/wolfcomp.html

Hamilton, J. and R. Gardner, "Value Added and Secondary Benefits in Regional Project Evaluation: Irrigation Development in the Snake River Basin," Annals of Regional Science, 20:1-12 (1986)

Hamilton, J., D. Huppert, K. Boire, K. Casavant, L. Peters, J. Richards, A. Scott, and P. Sorensen, "River Economics: Evaluating Trade-offs in Columbia River Basin Fish and Wildlife Programs and Policies," report by the Independent Economic Analysis Board of the Northwest Power Planning Council, February 2, 1999, www.uidaho.edu/~joelh/IEAB/NewRiver%20Econ.htm#River Economics

Hamilton, J., N. Whittlesey, H. Robison and J. Ellis, "Economic Impacts, Value Added and Benefits in Regional Project Analysis", American Journal of Agricultural Economics, 73:334-44 (1991).

Haveman, R. and K. Krutilla, Unemployment, Idle Capacity, and the Evaluation of Public Expenditures: National and Regional Analysis, Baltimore: Johns Hopkins Univ. Press (1968).

Howe, C., "Project Benefits and Costs from National and Regional Viewpoints: Methodological Issues and Case Study from the Colorado-Big Thompson Project," Natural Resources Journal, 27:5-20 (1987).

Howe, C., "Economic Damages to Texas from Breaches of the Pecos River Compact: 1959 to 1986," unpublished testimony prepared for U.S. Supreme Court case Texas v. New Mexico (1989).

Jensen, R.C., "Construction and Use of Regional Input-Output Models: Progress and Prospects," International Regional Science Review, 13(1&2): 9-25 (1990).

Keith, J. and T. Glover, "Secondary Impacts and Benefits of Water Reallocation in the Snake River Basin of Idaho," Report to the Snake River Studies Advisory Committee, Idaho Water Resources Research Institute, Moscow, ID (1988).

Leontief, W.W., "Quantitative Input and Output Relations in the Economic System of the United States," Review of Economic Statistics, 18(3): 105-125 (1936).

Miller, R. and P. Blair, Input-Output Analysis: Foundations and Extensions, Englewood Cliffs, NJ: Prentice Hall (1985).

Minnesota IMPLAN Group, Inc., IMPLAN Pro, User's Guide, Analysis Guide, Data guide, MIG, Inc: Stillwater, MN (1999).

Moore, F.T. and J.W. Peterson, "Regional Analysis: An Interindustry Model of Utah," Review of Economic Statistics, 37: 368-383 (1955).

Oosterhaven, J. "On the Plausibility of the Supply-Driven Input-Output Model," Journal of Regional Science, 28: 203-217 (1988).

Oosterhaven, J. "The Supply-Driven Input-Output Model: A New Interpretation but Still Implausible," Journal of Regional Science, 29: 459-465 (1989).

United States Department of Agriculture, "The Northwest Forest Plan: A Report to the President and Congress," (December 1996).

US Water Resources Council, "Economic and Environmental Principles and Guidelines for Water and Related Land Resources Implementation Studies," xx Fed. Reg. xx, xxxx (March 10, 1983).

Young, R. and L. Gray, "Input-Output Models, Economic Surplus, and the Evaluation of State or Regional Water Plans," Water Resources Research, 21(12): 1819-1823 (1985).

0-003
R3

CENTER FOR NATIVE ECOSYSTEMS

1536 Wynkoop, Suite 301
Denver, Colorado 80202
303.546.0214 fax: 303.825.2403
cne@nativeecosystems.org
www.nativeecosystems.org

To: Steve Spangle
From: Erin Robertson
Pages: 12 (including cover)
Re: Southwestern willow flycatcher Critical Habitat scoping comments

Steve – We unsuccessfully attempted to email this twice yesterday. I'm including the failure notices.
Erin

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BY EMAIL AND U.S. POST

March 8, 2004

Steve Spangle, Field Supervisor
Arizona Ecological Services Office
U.S. Fish and Wildlife Service
2321 West Royal Palm Road, Suite 103
Phoenix, Arizona 85021

Re: Scoping Comments on Proposed Southwestern Willow Flycatcher Critical Habitat Designation

Dear Mr. Spangle:

On behalf of the undersigned organizations and our members, please accept these comments on the redesignation of critical habitat for the southwestern willow flycatcher. We support and incorporate by reference the comments submitted by Center for Biological Diversity in their letter of March 8, 2004. The flycatcher is one of the most imperiled songbirds in North America, and its recovery will depend on the assertive protection of occupied and unoccupied recovery habitat. CH2

Given the highly imperiled status of the flycatcher, it is imperative that the Service include the following in its Critical Habitat Designation:

- all recently occupied sites (including the 221 sites across six recovery areas described in the Recovery Plan and sites in reaches of watersheds that were not included in critical habitat even though other portions of that watershed were included); HE1
- all reaches surrounding existing sites be included in critical habitat, excluding natural or anthropogenic breaks (as described in the Center for Biological Diversity comment letter incorporated above); HE1
- unoccupied but suitable habitat, including river stretches incorporated into the original Critical Habitat Designation; and HE1
- all areas in the Southern Rockies ecoregion, including the San Luis Valley, known to have been occupied by southwestern willow flycatcher. HE1

In the previous designation, the Service excluded a number of areas where they believed that existing management negated the benefits of critical habitat, including the entire Rio Grande River. We strongly object to the exclusion of any areas on this basis and hold that any such exclusions would be illegal. PR4

Similarly, the Service cannot exclude areas from the Critical Habitat Designation on the basis of an existing or potentially forthcoming Habitat Conservation Plan. Because such areas are or may be included in Habitat Conservation Plans they are, by definition, areas that require "special management considerations" and thus must be included in the Critical Habitat. The plain language of the act and recent caselaw support (e.g., Center for Biological Diversity v. Norton, 240 F.Supp.2d 1090, D.Ariz. 2003) our view. Although current management may ensure that adverse modification is not occurring, there is no assurance that the current management scheme will remain in effect through recovery and delisting of the bird. These concerns are especially pronounced given increasing pressure on southwest willow flycatcher habitat. Given the rarity of this species and the severe loss of habitat it has endured, the Service cannot exclude any existing sites from the designation.

PR 49

Aside from the substantive differences in the level of protection provided by existing management plans and the designation of Critical Habitat, the very fact that existing management plans are subject to amendment and modification means that they provide a less secure conservation benefit to the species.

PR 49

Finally, we believe the Service's insistence that Critical Habitat provides no conservation benefits beyond those provided by listing to be contrary to law. The plain language of the act and recent caselaw strongly support this view.

Thank you for your consideration of our comments. Please add all of the undersigned groups to your mailing list for this process, and send any future relevant documents in a timely manner. Also, feel free to contact us with any questions or to further discuss the issues raised in these scoping comments.

Sincerely,

Erin Robertson
Staff Biologist

on behalf of:

Mark Pearson, Executive Director
San Juan Citizens Alliance
P.O. Box 2461
Durango, Colorado 81302

Jeff Berman, Executive Director
Colorado Wild
P.O. Box 2434
Durango, Colorado 81302

Roz McClellan, Director
Rocky Mountain Recreation Initiative
1567 Twin Sisters Rd.
Nederland, CO 80466

Same as previous.

-----Original Message-----
From: MAILER-DAEMON@mx100.mysite4now.com
[mailto:MAILER-DAEMON@mx100.mysite4now.com]
Sent: Monday, March 08, 2004 9:55 PM
To: gulo@indra.com
Subject: failure notice

Hi. This is the qmail-send program at mx100.mysite4now.com.
I'm afraid I wasn't able to deliver your message to the following addresses.
This is a permanent error; I've given up. Sorry it didn't work out.

<WIFLcomments@fws.org>:
user does not exist, but will deliver to
/var/vpopmail/domains/fws.org/admin/Maildir/
can not open new email file errno=2
file=/var/vpopmail/domains/fws.org/admin/Maildir/tmp/1078808117.22029.mail10
0.webhost4life.com,S=5288
system error

--- Below this line is a copy of the message.

Return-Path: <gulo@indra.com>
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Received: from rwcrmhc12.comcast.net (216.148.227.85)
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Received: from Otter (c-24-8-114-58.client.comcast.net[24.8.114.58])
          by comcast.net (rwcrmhc12) with SMTP
          id <20040309044718014006k1ake>; Tue, 9 Mar 2004 04:47:18 +0000
From: "Jacob Smith" <gulo@indra.com>
To: <WIFLcomments@fws.org>
Cc: "Mark Pearson" <mpearson@frontier.net>,
      "Jeff Berman" <jberman@coloradowild.org>,
      "Roz Mcclellan" <mcclelr@spot.colorado.edu>
Subject: Scoping Comments on Critical Habitat Designation for Southwestern
Willow Flycatcher
Date: Mon, 8 Mar 2004 21:47:21 -0700
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X-MIMEOLE: Produced By Microsoft MimeOLE V6.00.2800.1165
Importance: Normal

BY EMAIL AND U.S. POST

March 8, 2004

Steve Spangle, Field Supervisor
Arizona Ecological Services Office
U.S. Fish and Wildlife Service
2321 West Royal Palm Road, Suite 103
Phoenix, Arizona 85021

Re: Scoping Comments on Proposed Southwestern Willow Flycatcher Critical
Habitat Designation

Dear Mr. Spangle:

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were not included in critical habitat even though other portions of that
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excluding natural or anthropogenic breaks (as described in the Center for
Biological Diversity comment letter incorporated above);

- unoccupied but suitable habitat, including river stretches incorporated
into the original Critical Habitat Designation; and

- all areas in the Southern Rockies ecoregion, including the San Luis
Valley, known to have been occupied by southwestern willow flycatcher.

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habitat, including the entire Rio Grande River. We strongly object to the exclusion of any areas on this basis and hold that any such exclusions would be illegal. Similarly, the Service cannot exclude areas from the Critical Habitat Designation on the basis of an existing or potentially forthcoming Habitat Conservation Plan. Because such areas are or may be included in Habitat Conservation Plans they are, by definition, areas that require "special management considerations" and thus must be included in the Critical Habitat. The plain language of the act and recent caselaw support (e.g., Center for Biological Diversity v. Norton, 240 F.Supp.2d 1090, D.Ariz. 2003) our view. Although current management may ensure that adverse modification is not occurring, there is no assurance that the current management scheme will remain in effect through recovery and delisting of the bird. These concerns are especially pronounced given increasing pressure on southwest willow flycatcher habitat. Given the rarity of this species and the severe loss of habitat it has endured, the Service cannot exclude any existing sites from the designation.

Aside from the substantive differences in the level of protection provided by existing management plans and the designation of Critical Habitat, the very fact that existing management plans are subject to amendment and modification means that they provide a less secure conservation benefit to the species.

Finally, we believe the Service's insistence that Critical Habitat provides no conservation benefits beyond those provided by listing to be contrary to law. The plain language of the act and recent caselaw strongly support this view.

Thank you for your consideration of our comments. Please add all of the undersigned groups to your mailing list for this process, and send any future relevant documents in a timely manner. Also, feel free to contact us with any questions or to further discuss the issues raised in these scoping comments.

Sincerely,

Erin Robertson, Staff Biologist
Center for Native Ecosystems
1536 Wynkoop, Suite 301
Denver, Colorado 80202

on behalf of:

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San Juan Citizens Alliance
P.O. Box 2461
Durango, Colorado 81302

Jeff Berman, Executive Director
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P.O. Box 2434
Durango, Colorado 81302

Roz McClellan, Director
Rocky Mountain Recreation Initiative
1567 Twin Sisters Rd.
Nederland, CO 80466

-----Original Message-----
From: MAILER-DAEMON@mx100.mysite4now.com
[mailto:MAILER-DAEMON@mx100.mysite4now.com]
Sent: Monday, March 08, 2004 10:10 PM
To: gulo@indra.com
Subject: failure notice

Hi. This is the qmail-send program at mx100.mysite4now.com.
I'm afraid I wasn't able to deliver your message to the following
addresses.
This is a permanent error; I've given up. Sorry it didn't work out.

<greg_beatty@fws.org>:
user does not exist, but will deliver to
/var/vpopmail/domains/fws.org/admin/Maildir/
can not open new email file errno=2
file=/var/vpopmail/domains/fws.org/admin/Maildir/tmp/1078809013.32402.m
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0.webhost4life.com,S=7846
system error

<steve_spangle@fws.org>:
user does not exist, but will deliver to
/var/vpopmail/domains/fws.org/admin/Maildir/
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file=/var/vpopmail/domains/fws.org/admin/Maildir/tmp/1078809013.32403.m
ail10
0.webhost4life.com,S=7846
system error

--- Below this line is a copy of the message.

Return-Path: <gulo@indra.com>
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Received: from rwcrmhc11.comcast.net (204.127.198.35)
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          id <20040309050212013000dd1e1e>; Tue, 9 Mar 2004 05:02:12
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From: "Jacob Smith" <gulo@indra.com>
To: <greg_beatty@fws.org>,
      <steve_spangle@fws.org>
Cc: "Mark Pearson" <mpearson@frontier.net>,
      "Jeff Berman" <jberman@coloradowild.org>,
      "Roz Mcclellan" <mcclelr@spot.colorado.edu>,
      "Erin Robertson" <erin@nativeecosystems.org>
Subject: Scoping Comments on Critical Habitat Designation for
Southwestern
Willow Flycatcher
Date: Mon, 8 Mar 2004 22:02:15 -0700
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X-MIMEOLE: Produced By Microsoft MimeOLE V6.00.2800.1165
Importance: Normal

Mr. Beatty and Mr. Spangle,

I just sent scoping comments on your Notice of Intent to prepare an EA for
the designation of Critical Habitat for the southwestern willow flycatcher
to the address noted in the Federal Register Notice (FR Vol. 69, No. 13,
Wednesday, January 21, 2004, Notices, p. 2941). The email bounced and I've
included the bounce message, as well as our comments, below. We will both
fax and send by U.S. Post a hard copy of our comments tomorrow. I trust you
will accept these as timely. Please let us know if there are any problems.

Many thanks,

Jacob Smith, Executive Director
Center for Native Ecosystems
1536 Wynkoop, Suite 301
Denver, Colorado 80202
(303) 546-0214

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user does not exist, but will deliver to
/var/vpopmail/domains/fws.org/admin/Maildir/
can not open new email file errno=2
file=/var/vpopmail/domains/fws.org/admin/Maildir/tmp/1078808117.22029.mail10
0.webhost4life.com,S=5288
system error

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          by comcast.net (rwcrmhc12) with SMTP
          id <20040309044718014006k1ake>; Tue, 9 Mar 2004 04:47:18
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From: "Jacob Smith" <gulo@indra.com>
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Cc: "Mark Pearson" <mpearson@frontier.net>,
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Subject: Scoping Comments on Critical Habitat Designation for
Southwestern
Willow Flycatcher
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BY EMAIL AND U.S. POST

March 8, 2004

Steve Spangle, Field Supervisor
Arizona Ecological Services Office
U.S. Fish and Wildlife Service
2321 West Royal Palm Road, Suite 103
Phoenix, Arizona 85021

Re: Scoping Comments on Proposed Southwestern Willow Flycatcher
Critical
Habitat Designation

Dear Mr. Spangle:

On behalf of the undersigned organizations and our members, please
accept
these comments on the redesignation of critical habitat for the
southwestern
willow flycatcher. We support and incorporate by reference the
comments
submitted by Center for Biological Diversity in their letter of March
8,
2004. The flycatcher is one of the most imperiled songbirds in North
America, and its recovery will depend on the assertive protection of

occupied and unoccupied recovery habitat.

Given the highly imperiled status of the flycatcher, it is imperative that the Service include the following in its Critical Habitat Designation:

- all recently occupied sites (including the 221 sites across six recovery areas described in the Recovery Plan and sites in reaches of watersheds that were not included in critical habitat even though other portions of that watershed were included);

- all reaches surrounding existing sites be included in critical habitat, excluding natural or anthropogenic breaks (as described in the Center for Biological Diversity comment letter incorporated above);

- unoccupied but suitable habitat, including river stretches incorporated into the original Critical Habitat Designation; and

- all areas in the Southern Rockies ecoregion, including the San Luis Valley, known to have been occupied by southwestern willow flycatcher.

In the previous designation, the Service excluded a number of areas where they believed that existing management negated the benefits of critical habitat, including the entire Rio Grande River. We strongly object to the exclusion of any areas on this basis and hold that any such exclusions would be illegal. Similarly, the Service cannot exclude areas from the Critical Habitat Designation on the basis of an existing or potentially forthcoming Habitat Conservation Plan. Because such areas are or may be included in Habitat Conservation Plans they are, by definition, areas that require "special management considerations" and thus must be included in the Critical Habitat. The plain language of the act and recent caselaw support (e.g., Center for Biological Diversity v. Norton, 240 F.Supp.2d 1090, D.Ariz. 2003) our view. Although current management may ensure that adverse modification is not occurring, there is no assurance that the current management scheme will remain in effect through recovery and delisting of the bird. These concerns are especially pronounced given increasing pressure on southwest willow flycatcher habitat. Given the rarity of this species and the severe loss of habitat it has endured, the Service cannot exclude any existing sites from the designation.

Aside from the substantive differences in the level of protection provided by existing management plans and the designation of Critical Habitat, the very fact that existing management plans are subject to amendment and modification means that they provide a less secure conservation benefit to the species.

Finally, we believe the Service's insistence that Critical Habitat provides no conservation benefits beyond those provided by listing to be contrary to law. The plain language of the act and recent caselaw strongly support this view.

Thank you for your consideration of our comments. Please add all of the undersigned groups to your mailing list for this process, and send any future relevant documents in a timely manner. Also, feel free to contact us with any questions or to further discuss the issues raised in these scoping comments.

Sincerely,

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on behalf of:

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March 8, 2004

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Re: Comments by the Rio Grande Water Conservation District on Preparation of a Proposed Rule Designating Critical Habitat for the Southwestern Willow Flycatcher and Related NEPA Compliance

Dear Mr. Spangle:

The Rio Grande Water Conservation District (District) submits these comments in response to the January 21, 2004 Notice of Intent published by the U.S. Fish and Wildlife Service (FWS) with regard to scoping meetings and intent to prepare an environmental assessment for the proposed critical habitat designation for the southwestern willow flycatcher (flycatcher). 69 Fed. Reg. 2940 (January 21, 2004). We appreciate the opportunity to provide comments to FWS on this important rule-making process.

Introduction

On behalf of five counties in the San Luis Valley of Colorado, the District has initiated a feasibility study for the preparation of a Habitat Conservation Plan (HCP) for the flycatcher and other species in the San Luis Valley that would support an application for an incidental take permit (Permit) from the FWS. The District has retained ERO Resources Corp., an environmental consulting firm with experience in preparing HCPs for the flycatcher and other species, to help prepare this Habitat Conservation Plan.

PR21

The anticipated goals of the HCP would be to provide long-term protection and conservation for the endangered flycatcher and its habitat, to protect the land and water use practices and values of private landowners which are essential to the large agricultural community in the San Luis Valley, and to provide an example of

implementing a regional HCP in rural areas. The District believes that implementation of an HCP in the San Luis Valley would be a more proactive, cooperative approach to flycatcher conservation than endless consultations between FWS and affected parties. The HCP approach would provide effective, long-term protection and conservation for the flycatcher. It is the District's position that development and acceptance of the HCP by FWS would preclude the need to designate critical habitat within the San Luis Valley, except perhaps on public lands that have existing or potential flycatcher habitat. PR 27

Below, the District provides comments regarding the scope of critical habitat designation, particularly in the San Luis Valley. The description of the District's interest in the designation is followed by background on critical habitat designations on other species in Colorado and a summary of the applicable standards under the Endangered Species Act (ESA). The main body of the comments describes application of the ESA standards to designation of critical habitat in the San Luis Valley, if necessary. Specific areas of concern, primary constituent elements of flycatcher habitat, and issues to be addressed in the San Luis Valley conclude our comments.

The District's Interest in Flycatcher Critical Habitat Designation

The District is comprised of cities, towns, water conservancy districts, water users associations, and irrigation companies in the San Luis Valley including Alamosa, Conejos, Costilla, Rio Grande, and Saguache Counties. It was formed in 1967 to represent the San Luis Valley in litigation concerning the Rio Grande Compact. In more recent years, the District has taken leadership on a number of data gathering, educational, and environmental initiatives, including introduction of federal legislation in 2003 to establish the Rio Grande Outstanding Natural Area. The District is submitting comments in response to the scoping notice because of numerous concerns, including:

- Possible adverse effects on the District's statutory obligation to safeguard the waters of the Rio Grande and its tributaries, to which Colorado is equitably entitled by the Rio Grande Compact, and to meet Colorado's Rio Grande Compact obligations.
- Possible additional adverse effects on land and water uses, including water delivery and irrigation systems. PR 30
- Possible adverse effects on the District's proposed HCP.
- Possible adverse effects on agricultural activities including grazing.
- Possible damage to the existing good working relationship between private landowners and federal and state agencies, including FWS, to protect and benefit wildlife.
- Possible loss of future opportunities to manage habitat for the benefit of other wildlife species.

Background on Other Critical Habitat Designations in Colorado

In 2003, critical habitat was designated for the Preble's meadow jumping mouse (*Zapus hudsonius preblei*) and proposed for the Mexican spotted owl (*Strix occidentalis lucida*). 68 Fed. Reg. 37276 (June 23, 2003); 68 Fed. Reg. 65020 (November 18, 2003). To date,

these are the only terrestrial species with designated or proposed designated critical habitat in Colorado, and the designations focus on public lands.

For Preble's, the proposed designation of critical habitat emphasized "The presence of lands devoted to conservation, either public lands such as parks, wildlife management areas, and dedicated open space, or private lands under conservation easements." 67 Fed. Reg. 47161 (July 17, 2002). The final rule also considered the regional HCPs currently being developed for the benefit of Preble's and other species. As a result of these considerations, the designation of critical habitat in Douglas County is limited to federal lands and no critical habitat is designated in Boulder or El Paso Counties. The majority of the critical habitat designated in Jefferson County occurs on public lands. The critical habitat designated in Larimer County includes public and private lands, although a substantial portion of the critical habitat occurs on federal lands within the Arapaho-Roosevelt National Forest.

In Colorado, the proposed designation of critical habitat for the Mexican spotted owl is limited solely to Forest Service and BLM lands. 66 Fed. Reg. 8543 (February 1, 2001); 68 Fed. Reg. 65020 (November 18, 2003).

Prior designations of critical habitat in Colorado have clearly focused on the abundant areas of publicly owned lands and ongoing efforts to benefit these listed species. Similarly, any proposed designation of critical habitat in Colorado for the flycatcher should focus on public lands and consider ongoing activities that benefit flycatchers. CH 4

Applicable Standards

The methodologies and criteria to be used by the FWS in designating critical habitat are set forth in the ESA, 16 U.S.C. § 1533(b)(2), and the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332(2)(C), (E). These requirements are summarized below as background for the District's comments.

Section 3 of the ESA defines critical habitat to include areas occupied by the species, which are "essential to the conservation of the species" and which "may require special management consideration or protection." 16 U.S.C. § 1532(5). Areas outside of the geographical areas occupied by the species also may be designated as critical habitat if FWS finds that "a designation limited to [the species'] present range would be inadequate to ensure the conservation of the species." 50 C.F.R. § 424.12(e). PR 165

The designation of critical habitat must be based on "the best scientific data available." 16 U.S.C. § 1533(b)(2). FWS may designate critical habitat only "after taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat." *Id.* FWS regulations specify the process for determining the economic and other impacts of the designation as follows: PR 57 CH 15 E31

> The Secretary shall identify any significant activities that would either affect an area considered for designation as critical habitat or be likely to be affected by the designation, and shall, *after proposing designation of* PR 166

> *such an area,* consider the probable impacts of the designation upon proposed or ongoing activities. The Secretary may exclude any portion of such an area from the critical habitat if the benefits of such exclusion outweigh the benefits of specifying the area as part of the critical habitat. The Secretary shall not exclude any such area if, based on the best scientific data available, [s]he determines that the failure to designate that area as critical habitat will result in the extinction of the species concerned. 50 C.F.R. § 424.19 (emphasis added).

PR 166

Thus, the designation of critical habitat requires a balancing of interests, which requires public input in the collection and analysis of information relevant to the designation. 50 C.F.R. § 424.16.

PR 167

In designating critical habitat, FWS must consider "the economic impact, and any other relevant impact, of specifying any particular area as critical habitat." 16 U.S.C. § 1533(b)(2); 50 C.F.R. § 424.12. This requires the identification of "any significant activities that would either affect an area considered for designation as critical habitat or be likely to be affected by the designation." *Id.* § 424.19. Once potentially affected activities have been identified, and "after proposing designation of such an area, [FWS must] consider the probable economic and other impacts of the designation upon proposed or ongoing activities." *Id.* The result of this process is an "economic analysis." FWS may exclude an area from the critical habitat designation if, after conducting its economic analysis and evaluating other impacts, it determines that benefits of excluding the area outweigh the benefits of including it. *Id.* § 1533(b)(2).

PR57
CH15
E31

The scope of the economic analysis has been the subject of litigation in recent years with respect to critical habitat designation for the flycatcher. The United States Court of Appeals for the Tenth Circuit held that FWS must analyze "all of the economic impacts of a critical habitat designation, regardless of whether the impacts are attributable co-extensively to other causes." *New Mexico Cattle Growers Ass'n v. U.S. Fish and Wildlife Service,* 248 F.3d 1277 (10th Cir. 2001). The Court also concluded that FWS' economic analysis of the impacts of the critical habitat designation for the flycatcher failed to meet this standard. 248 F.3d at 1285; 16 U.S.C. § 1533(b). In its decision, the court reiterated its earlier ruling in *Catron County v. United States Fish and Wildlife Service,* 75 F.3d 1429, 1436 (10th Cir. 1996), which required FWS to address the environmental impacts of a critical habitat designation through compliance with NEPA.

PR57
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E31

The Tenth Circuit's decisions in *New Mexico Cattle Growers' Ass'n* and *Catron County* require FWS to adhere to a process for designating critical habitat that includes a comprehensive analysis of economic and other environmental impacts of the designation to comply with NEPA. Together, the economic and NEPA analyses provide the basis for decisions by FWS to include or exclude lands from the final designation. 16 U.S.C. § 1533(b)(4). Thus, the preparation of the economic analysis should be undertaken simultaneously with the analysis of impacts under NEPA before publication of the final rule.

PR57
CH15
E31

Application of the Standards in the San Luis Valley

Two general issues with respect to flycatcher critical habitat designation are discussed below — the scope of NEPA compliance and inclusion of the entire 100-year floodplain — followed by suggested primary constituent elements and application of those elements to specific areas in the San Luis Valley.

Scope of NEPA Compliance

FWS must ultimately prepare an Environmental Impact Statement (EIS) for designation of flycatcher critical habitat because this rule-making is a "significant" federal action given its geographic scope and uniqueness, controversial nature, uncertainties, types and sizes of economic activities potentially affected, and involvement of species listed under the ESA. *See* RP (numerous economic activities affect habitat); 40 C.F.R. § 1508.27. The Tenth Circuit has determined that the FWS must usually prepare an EIS when designating critical habitat — exceptions "will be unquestionably rare." *Middle Rio Grande Conservancy Dist. v. Babbitt*, 206 F.Supp.2d 1156 at 1193 (citing *Catron County*). Moreover, in scheduling the re-designation of flycatcher critical habitat, the New Mexico District Court suggested that FWS give full consideration to the issues raised in that proceeding including allowance of sufficient time for FWS to prepare an EIS in order to fully consider alternatives, to conduct the environmental analysis, and to consider public input. *Center for Biological Diversity v. Norton*, Memorandum Opinion (D.N.M. Sep. 30, 2003). Although it is common for an agency to prepare an Environmental Assessment (EA) as a first step and then decide whether an EIS is necessary, preparation of an EA in this case where an EIS is so clearly necessary would invite litigation, cause delay, and waste the time and resources of FWS and stakeholders.

PR32

Designation of the Entire 100-Year Floodplain Is Inappropriate

The 1997 rule designating flycatcher critical habitat included all land within the 100-year floodplain along the identified stream reaches. 62 Fed. Reg. 39132 (July 22, 1997). The scoping notice indicates that FWS believes that designating the 100-year floodplain for the lateral extent of critical habitat designation may again be appropriate "due to the dynamic nature of riparian habitat." 69 Fed. Reg. 2941 (January 21, 2004). Use of the entire width of the 100-year floodplain as the lateral extent of critical habitat is clearly inappropriate. The District is not aware of <u>any</u> scientific evidence that the entire width of the 100-year floodplain has been able or will ever be able to support riparian vegetation suitable for flycatcher habitat. Moreover, a substantial body of literature on cottonwood and willow establishment indicates that most of this vegetation is produced and maintained within the 25-year floodplain.[1] In the Roosevelt HCP and accompanying

LX6

[1] Cottonwood and willow are pioneer riparian species that depend on episodic floods and shallow water tables to provide conditions conducive for establishment of new stands of trees (RP, Appendix I; Scott et al. 1993; Shafroth et al. 1998; Stromberg 2001). Areas of scoured alluvium or fresh sediment deposits favorable for seedling recruitment and establishment of new stands require relatively large flood events where the flow recedes slowly following the flood. Typically, these flood events have a return interval of about

biological opinion, lands with a maximum depth to ground water of 1.5 m (5 ft) on the active floodplain were determined to be the maximum extent of the area where flycatcher habitat currently exists or may exist in the future.[2] SRP 2002, p. 124; FWS 2003, p. 49.

The District believes that FWS can quickly and accurately delineate critical habitat using the criterion of a maximum depth to ground water of 1.5 m (5 ft) using readily available information including GIS technology (digital elevation models and stream features), aerial photographs, topographic maps, field observations, reports, and interviews with local biologists and hydrologists.

LX6

The District supports designating flycatcher critical habitat using specific stream reaches, the same approach used in the 1997 rule. 62 Fed. Reg. 39138 (July 22, 1997). For example, several specific reaches along the Rio Grande and Conejos Rivers are suggested later in these comments as potential critical habitat.

Primary Constituent Elements

The 1997 final rule designating critical habitat described the primary constituent elements of flycatcher habitat in very general terms, in part due to the time constraints imposed by a court order for completing the designation. 62 Fed. Reg. 39130 (July 22, 1997). After describing the regulatory list of general physical and biological factors to be considered, which are found at 50 C.F.R. §§ 424.12(b)(1)-(5), the rule states:

> For all areas of critical habitat designated here, these physical and biological features are provided or will be provided by dense thickets of riparian shrubs and trees (native and exotic species). This vegetation, by definition, occurs near rivers, streams, open water, cienegas, marshy seeps, or saturated soil. Constituent elements of critical habitat include the riparian ecosystem within the 100-year floodplain, including areas where dense vegetation is not present, but may become established in the future. 62 Fed. Reg. 39132 (July 22, 1997).

HE3

The 1997 rule continues with a general description of the attributes of riparian vegetation used as breeding habitat by flycatchers — species composition, vegetation structure, and patch size and shape. *Id.*

Although the prior rule generally describes the vegetation characteristics of flycatcher breeding habitat, the primary constituent elements should be set forth more specifically in

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1 in 7 to 1 in 25 years depending on the river (Braatne et al. 1996; Scott et al. 1996; Stromberg et al. 1991, 1993; Stromberg 2001).

[2] Depth to ground water must generally be less than 1 m (3 ft) for establishment of new cottonwoods and willows (Stromberg at al. 1991; Stromberg et al. 1996). However, once established, cottonwood-willow habitat can be sustained by ground water within 3 m (10 ft) or more from the surface. The 1.5 m (5 ft) criterion reflects that cottonwoods and willows will become established and can be sustained over this portion of the floodplain as the channel migrates across this portion of the floodplain (Id.; Springer et al. 1999).

order to: a) designate only the habitat that is essential to the conservation of the species, and b) accurately assess the potential future destruction or adverse modification of critical habitat. A great deal of flycatcher research has been conducted since issuance of the 1997 rule including development of the Recovery Plan. Information from this research constitutes the best available science to be used to specify the primary constituent elements of flycatcher critical habitat.

The following discussion and suggested specifications of the primary constituent elements of flycatcher critical habitat are derived from several sources including:

1. The flycatcher Recovery Plan, "RP" (FWS 2002);
2. The Nature Conservancy's Rangewide Assessment of Habitat Acquisition Priorities for the Southwestern Willow Flycatcher, (Fichtel and Marshall 1999);
3. A model of flycatcher breeding habitat in central Arizona (Hatten and Paradzick 2003); and
4. The Roosevelt Habitat Conservation Plan or (SRP 2002) and biological opinion (FWS 2003).

HE3

The primary constituent elements of flycatcher critical habitat should focus on breeding habitat because: a) this component of habitat is essential to the recovery of the species; and b) the specific characteristics of flycatcher breeding habitat are relatively unique in the Southwest, and thus comprise the limiting factor for flycatcher populations. *See* RP in general. Appropriately, breeding habitat also was the focus of the 1997 rule and is one of the required considerations by FWS. 62 Fed. Reg. 39132, 39133 (July 22, 1997); 50 C.F.R. § 424.12(b)(4). Although flycatchers sometimes use adjacent riparian and upland areas for feeding and other activities, these areas, which are integral to breeding, are always found in conjunction with breeding habitat, and thus do not require separate consideration.

HE3

As set forth in the 1997 designation of flycatcher critical habitat, areas currently or potentially suitable for flycatcher breeding have (or are capable of having) relatively wide, dense, tall stands of riparian shrubs or trees ("tall woody vegetation" in these comments). RP, p. 11. These stands of tall woody vegetation may be comprised of native and/or exotic species of riparian trees and shrubs. *Id.*, p. 11. More specifically, the tall woody vegetation used by flycatchers typically ranges in height from 2 to 4 m (6 to 13 ft) at elevations above about 1,525 m (5,000 ft) and 3 to 30 m (10 to 98 ft) at lower elevations. *Id.*, pp. 11, 12. Usually, dense vegetation occurs within the first 2 to 4 m (6 to 13 ft) above ground in these stands. *Id.*, p. 11. Tall woody vegetation used as breeding habitat for flycatchers varies in size and shape but the width of patches is usually greater than 10 m (33 ft). *Id.*, p. 17. Where such tall woody vegetation is not currently present, recent or historical information should be used to confirm that appropriate conditions are present to support such habitat in the future (e.g., reports, photos, topographic maps, interviews and other data). Fichtel and Marshall 1999, p. 2.

HE4

Flycatcher breeding habitat occurs near perennial, still or slow-moving water. RP, p. 18; Fichtel and Marshall 1999, p.2. Important geomorphological characteristics of breeding sites include a relatively broad low floodplain without stream entrenchment. RP, pp. 16, 18; Fichtel and Marshall 1999, p.2. These geomorphological characteristics promote restoration, maintenance and recycling of tall woody vegetation through scouring floods, sediment deposition, periodic partial inundation, and shallow ground water tables. RP, pp. 16, 18. The portion of the floodplain having a ground water table within 1.5 m (5 ft) of the surface is the area having the hydrological and geomorphological conditions that support tall woody vegetation used by flycatchers. SRP 2002, p. 124; FWS 2003, p. 49. The minimum width of the floodplain with these hydrological and geomorphological conditions should be about 300 m (1,000 ft) based on field observations of flycatcher habitat in Arizona, New Mexico, and southern Colorado. These field observations correspond well with the 360 m (1,200 ft) diameter of the 41 ha (101 ac) floodplain "neighborhood" in which most breeding sites were found at four large study sites in central Arizona. Hatten and Paradzick 2003. In addition to on-site characteristics, watershed characteristics and conditions that favor maintenance of these hydrological and geomorphological conditions also should be considered in selecting critical habitat reaches. TNC, pp. 2, 3. The consideration of potential land and water use impacts on flycatcher habitat is discussed more fully in the next paragraph.

HE4

One of the requirements of critical habitat is that these areas should be "protected from disturbance or are representative of the historical geographical and ecological distributions of a species." 50 C.F.R. §§ 424.12(b)(1)-(5). In other words, if suitable locations are available elsewhere, it does not make sense to designate critical habitat along stream reaches that are already impacted by land or water use activities or will soon be impacted by those activities. Examples of locations that are already impacted or are unlikely to be protected from impacts include stream reaches through urbanizing areas, the lower elevations of most reservoirs, and areas with intensive irrigation and grazing activity on private land. Regardless of the provisions of the ESA, these locations are unlikely to provide breeding habitat for flycatchers over the long term.

HE5

The Recovery Plan also lists other important components of breeding habitat, some of which should be incorporated into the list of primary constituent elements. RP, p. 18. Many of these components are not understood well enough to be specifically defined as part of the primary constituent elements (e.g., micro-climate and prey availability). *Id.* However, several of these factors should be used by FWS to define primary constituent elements, i.e., small patches should not be isolated, suitable habitat should be in proximity to currently occupied habitat, and there should not be an abundance of predators or parasites. *Id.*

HE4

In terms of isolated small patches of current or potential flycatcher habitat, it does not make sense to designate these as "critical" because: a) they are not "connected" to other habitat due to their isolation, b) tall woody vegetation is unlikely to be present at all times in those locations due to scouring or other losses, and c) small, isolated patches are unlikely to be able to support a self-sustaining local population of flycatchers. RP, pp. 74, 75. An isolated small patch should be defined as a patch smaller than 8 ha (20 ac),

which is more than 30 km (19 mi) from other suitable patches. RP, pp. 17, 22. Similarly, suitable habitat should be located in proximity to occupied habitat because of the strong site fidelity of flycatchers and higher colonization potential for nearby sites, and because close, connected populations promote genetic exchange and metapopulation stability. RP, pp. 74, 75. Suitable patches designated as "critical" should be within 100 km (60 mi) of occupied habitat to facilitate colonization. RP, p. 25. Finally, habitat with an abundance of predators or parasites (e.g., cowbirds or domestic cats) should not be designated where control of those biotic factors is unlikely. Examples of such stream reaches with uncontrollable predator or parasite problems include locations in or near urbanizing areas or within private land where grazing or other agricultural activities occur.

In summary, the primary constituent elements of flycatcher critical habitat should be defined as listed below. The order of the list is arranged to promote relatively quick screening of potential habitat areas.

#E4

1. The stream reach is perennial, with still or slow-moving water.
2. The stream reach is not entrenched.
3. The stream reach has an active floodplain of a minimum width of 300 m (1,000 ft) with a depth to ground water of 1.5 m (5 ft) or less.
4. The stream reach is free from significant impacts by current or imminent land and water use activities.
5. The stream reach has watershed characteristics and conditions favorable for maintenance of hydrological and geomorphological conditions that support tall woody vegetation.
6. The active floodplain along the stream reach currently has or will support tall woody vegetation with a height of 2 to 4 m (6 to 13 ft) at elevations above about 1,525 m (5,000 ft) and 3 to 30 m (10 to 98 ft) at lower elevations; dense vegetation within the first 2 to 4 m (6 to 13 ft) above ground; and a stand width greater than 10 m (33 ft).
7. The stream reach is within 100 km (62 mi) of occupied habitat.
8. The stream reach will support a patch of tall woody vegetation larger than 8 ha (20 ac) if it is farther than 30 km (19 mi) to another suitable patch.
9. The stream reach does not have the presence of uncontrollable numbers of predators or parasites.

The method used to determine suitable habitat must have a reasonable probability of identifying areas where all the primary constituent elements are present much of the time.

Issues to be Addressed in Evaluating Critical Habitat in the San Luis Valley

L061
CH53
CH54
E51
L037
E52

In summary, the primary issues that FWS must address in evaluating critical habitat in the San Luis Valley are:

1. How much flycatcher habitat might need to be designated in the San Luis Valley to conserve the subspecies?
2. Is the currently occupied habitat sufficient to conserve the subspecies?
3. What are the economic and other impacts associated with alternative proposals to designate flycatcher critical habitat?

The District suggests the following answers to these issues.

How much flycatcher habitat might need to be designated in the San Luis Valley? The Recovery Plan identifies the minimum number of territories that must persist in each management unit in order for recovery (down-listing and de-listing) of the species to occur. RP, pp. 77-85. The total amount of breeding habitat required by this number of territories should be multiplied by the average amount of 0.5 ha (1.2 ac) required per territory to estimate the base amount of habitat necessary to support those flycatchers. RP, p. 22. As noted in the Recovery Plan, the dynamic nature of riparian habitat in the Southwest necessitates that more habitat than needed at any one time should be available in order to offset the periodic recycling by flooding and re-growth required to sustain this type of habitat. RP, p. 80. The Recovery Plan specifies this amount as double the amount of habitat needed at any one time to recover the species. *Id.* This is the maximum amount of habitat that is "essential to conservation of the species," which is necessary to achieve recovery.

In the San Luis Valley Management Unit, the Recovery Plan identifies a minimum number of 50 territories for down-listing and de-listing. In 2002, 55 territories were identified in the San Luis Valley, more than the minimum number identified in the Recovery Plan. Sogge et al. 2003. In 2003, 62 territories were found, all on public land and mostly on the Rio Grande State Wildlife Area, Alamosa National Wildlife Refuge, and the BLM riparian area at McIntire Springs. The minimum number of 50 territories would require about 50 ha (120 ac) of existing and potential habitat (multiplying 50 territories by 0.5 ha (1.2 ac) per territory, and doubling that amount to offset periodic losses).

Is the currently occupied habitat sufficient? Yes, the currently occupied habitat on the Alamosa National Wildlife Refuge, the BLM riparian area at McIntire Springs, and the Rio Grande State Wildlife Area is sufficient to support at least the minimum of 50 territories because flycatcher density typically increases as the population increases, creating "infill" of presently occupied habitat. RHCP, pp. 49, 87. Moreover, there is adjacent existing and suitable habitat on these three state and federal wildlife areas to offset any periodic loss of occupied habitat. The District estimates that there are more than 300 ha (approximately 740 ac) of occupied and suitable habitat in these three areas, far more than the minimum amount essential to the conservation of the species. Thus,

these are the only areas that should be considered for proposed designation as critical habitat and additional suitable habitat does not need to be identified in response to question #3 above.

What are the economic and other impacts associated with alternative proposals to designate flycatcher critical habitat? The stream reaches on the Alamosa National Wildlife Refuge, the BLM riparian area at McIntire Springs, and the Rio Grande State Wildlife Area already are protected from development and have a priority for habitat protection. Thus, after publication in the proposed rule and consideration of impacts during the economic and NEPA analyses, the potential economic or other impacts would be minimal and the benefits of inclusion are likely to far outweigh the benefits of exclusion.

The District anticipates that one of the alternatives that FWS might consider at some point during the proposed rule-making is designation of additional reaches along the Rio Grande and lower Conejos Rivers in Colorado. However, these reaches should **not** be designated for a number of reasons, including:

- They lack one or more primary constituent elements of flycatcher habitat;
- They are not essential to the conservation of the species; and/or
- There would likely be significant economic and other impacts associated with designation that would outweigh the benefits of inclusion.

HE1

Most of the lower reaches of the Rio Grande River in Colorado, downstream of the confluence with the Conejos River, are incised and the floodplain is too narrow to reliably support flycatcher habitat. Farther upstream along the Rio Grande and lower Conejos Rivers in the San Luis Valley, nearly all land that is not encompassed within federal or state wildlife refuges is in private ownership. These reaches cannot reliably support flycatcher habitat primarily because of the impacts from adjacent land uses. In other words, these stream reaches do not contain the primary constituent element of freedom from significant disturbance by current or imminent land and water use activities (see section on Primary Constituent Elements above). In addition, predators and parasites abound along these reaches as a result of agricultural activities, including grazing. Finally, designation of additional reaches along the Rio Grande and Conejos Rivers would likely cause significant economic and other impacts over the long term by limiting land uses including flood control maintenance, agricultural activities, and water management. For example, the State of Colorado and the District water users are obligated to provide Rio Grande water to downstream states under the Rio Grande Compact. The Colorado State Engineer encourages private landowners to keep stream channels open to maintain current flows to meet these Compact obligations, and to maintain current irrigation practices and the intricate system of water rights administration in the San Luis Valley.

LO67
CH53
CH54
E51
LO37
E52

LO67
CH53
CH54
E51
LO37
E52

Summary

Stream reaches along the Rio Grande and lower Conejos Rivers that contain all of the primary constituent elements of flycatcher critical habitat are those that are already occupied and occur within federal and state wildlife refuges. Specifically, these reaches include the Alamosa National Wildlife Refuge, BLM lands at McIntire Springs, and the Rio Grande State Wildlife Area. Fortunately, these stream reaches already have a priority for habitat protection and management that benefits the flycatchers, as exemplified by the presence an increasing number of flycatcher territories in these areas: 62 territories were located in 2003, which is 12 more than the minimum required by the flycatcher Recovery Plan for this management unit. Thus, if the Service determines that critical habitat for the flycatcher needs to be designated in the San Luis Valley, these are the only areas that should be considered for potential designation as flycatcher critical habitat.

See previous

The District appreciates the opportunity to provide these comments. If you have any questions, please call.

Very truly yours,

Laura J. Bottaro

David W. Robbins
Laura J. Bottaro

References Cited

Braatne, J.H., S.B. Rood, and P.E Heilman. 1996. Life history, ecology, and conservation of riparian cottonwoods in North America. In Stettler, R.F., H.D. Bradshaw, Jr., P.E. Heilman, and T.M. Hinckley, eds. Biology of *Populus* and its implications for management and conservation. NRC Research Press. Ottawa, Ontario, Canada.

Fichtel, C. and R. Marshall. 1999. Rangewide assessment of habitat acquisition priorities for the southwestern willow flycatcher. Prepared by The Nature Conservancy, AZ Chapter, for the U.S. Bureau of Reclamation, Lower Colorado Regional Office, Boulder City, NV.

FWS (U.S. Fish and Wildlife Service). 2002. Southwestern willow flycatcher recovery plan. Albuquerque, NM.

Hatten, J.R. and C.E. Paradzick. 2003. A multiscaled model of southwestern willow flycatcher breeding habitat. J. Wildl. Manage. 67(4): 774-788. <www.usgs.nau.edu/swwf/Reports/>.

FWS (U.S. Fish and Wildlife Service). 2002. Southwestern willow flycatcher recovery plan. Albuquerque, NM.

FWS (U.S. Fish and Wildlife Service). 2003. Intra-Service Biological and Conference Opinion. Issuance of a Section 10(a)(1)(B) permit to Salt River Project for operation of Roosevelt Lake. February 21. <http://arizonaes.fws.gov>

Scott, M.L., M.A. Wondzell, and G.T. Auble. 1993. Hydrograph characteristics relevant to the establishment and growth of western riparian vegetation. *In* H.J. Morel-Seytoux (ed.), Proceedings of the Thirteenth Annual American Geophysical Union Hydrology Days, pp. 237-246. Hydrology Days Publications, Atherton, CA.

Scott, M.L., J.M. Friedman, and G.T. Auble. 1996. Fluvial process and the establishment of bottomland trees. Geomorphology 14:327-339.

Shafroth, P.B., G.T. Auble, J.C. Stromberg, and D.T. Patten. 1998. Establishment of woody riparian vegetation in relation to annual patterns of streamflow, Bill Williams Reservoir, Arizona. Wetlands, 18(4):577-590.

Sogge, M.K., P. Dockens, S.O. Williams III, B.E. Kus, and S.J. Sferra. 2003. Southwestern willow flycatcher breeding site and territory summary – 2002. USGS. <www.usgs.nau.edu/swwf/Reports/>.

Springer, A.E., J.M. Wright, P.B. Shafroth, J.C. Stromberg, and D.T. Patten. 1999. Coupling groundwater and riparian vegetation models to assess effects of reservoir releases. Water Resources Research, Vol. 35, No. 12. December.

SRP (Salt River Project). 2002. Roosevelt habitat conservation plan. <http://arizonaes.fws.gov>

Stromberg, J.C., D.T. Patten, and B.D. Richter. 1991. Flood flows and dynamics of Sonoran riparian forests. Rivers, 2(3):221-235.

Stromberg, J.C., B.D. Richter, D.T. Patten, and L.G. Wolden. 1993. Response of a Sonoran riparian forest to a 10-year return flood. Great Basin Naturalist 53(2):118-130.

Stromberg, J.C., R. Tiller, and B. Richter. 1996. Effects of ground water decline on riparian vegetation of semiarid regions: the San Pedro, Arizona. Ecological Applications, 00(0).

Stromberg, J.C. 2001. Restoration of riparian vegetation in the south-western United States: importance of flow regimes and fluvial dynamism. Journal of Arid Environments, 49:17-34.

0-005
R2

New Mexico Cattle Growers' Association

P.O. BOX 7517 • ALBUQUERQUE, NM 87194
TELEPHONE (505) 247-0584 • FAX (505) 842-1766
E-MAIL: nmcga@nmagriculture.org
WEB SITE: www.nmagriculture.org
Package only (no mail delivery): 2231 Rio Grande Blvd. NW, Albuquerque, NM 87104

March 8, 2004

U.S. Fish & Wildlife Service
Southwestern Willow Flycatcher Coordinator
Arizona Ecological Services Field Office
2321 W. Royal Palm Road, Suite 103
Phoenix, Arizona, 85021

FAX: 602.242.2513

WIFLcomments@fws.gov

RE: Notice of Scoping Meetings & Intent to Prepare an Environmental Assessment for the Proposed Designation of Critical Habitat for the Southwestern Willow Flycatcher

Dear Sir:

On behalf of the membership of the New Mexico Cattle Growers' Association (NMCGA), I am writing to comment on the above captioned court ordered designation of critical habitat for the southwestern willow flycatcher (SWFC). Thank you for this opportunity.

NMCGA is opposed to any designation of critical habitat that would impose an economic burden on rural families and communities within these areas. Potential designation maps show a broad expansion of critical habitat along the Rio Grande and Gila rivers that will have a negative effect on agriculture. Designation of critical habitat could have disproportionately high and adverse impacts on the minority and low-income populations residing in these areas if current agriculture practices are eliminated or curtailed. The majority of these maps show areas that are not being currently used as nest sites nor have the potential to become nesting sites in the foreseeable future. These areas should not be included within any critical habitat designation for the SWFC unless or until it is demonstrated that these areas are home to the birds.

E6
AG 13
S4
CH 12

We are told that habitat loss and degradation are attributed to agriculture, water diversion dams, and livestock grazing according to the scoping analysis in the **Federal Register**. How can this be when the largest known population of nesting SWFC in the world is in an area where all of these previous mentioned activities are taking place? SWFC are present, nesting, healthy and multiplying.

AG 4

New Mexico and the entire Southwest has been suffering a serious drought. With that drought, we have seen the dropping of water in our lakes and streams. NMCGA is extremely concerned about how the SWFC critical habitat designation will impact our water managers' abilities to rebuilding water storage in lakes and dams. The ability to hold water and cover lands not today covered by water will seriously impact New Mexico's ability to deliver water not only to agriculture producers in this state, but to meet court mandated water compacts with other states. SWFC critical habitat designation should not further harm New Mexicans and others dependent upon water storage at dams and lakes within the state.

W6

With that in mind, NMCGA is extremely concerned with the potential designation of the 100-year floodplain and ask for serious consideration before making such a move. LX2

NMCGA has serious concerns about the SWFC recovery plan as it conflicts with the recovery plan of the Rio Grande silvery minnow. One calls for the total elimination of salt cedar and the other calls for the protection of salt cedar at certain heights and density. One of the major problems with the Endangered Species Act (ESA) is that it is species specific and does take into account the entire ecosystem and the needs of all the components of that system. This in turn puts it into conflict with other species that are trying to be recovered. AG13

Given the scope of this proposal and the negative impact it will have on our members, and all New Mexicans, that reside in the proposed critical habitat areas, NMCGA respectfully requests that the U.S. Fish & Wildlife Service (FWS) produce an in-depth economic and social analysis on this designation and how it will affect rural families and communities, particularly minority populations. We stress the demand for a local analysis, not a national or even a state analysis, but one that describes those effects on the local communities within the proposed critical habitat areas. We would ask that any oral and written material produced by the FWS for this critical habitat designation be provided in both English and Spanish to ensure that all impacted citizens will have the opportunity to understand the process and its potential outcomes. E18 PR66

Incentives need to be used to entice more rural support for these types of efforts. Previous efforts of the ESA always have a negative impact. With incentives rather than punitive actions, agriculture producers could and would probably recover this species as well as any other endangered species. PR17

Thank you for the opportunity to comment on this proposal and we look forward to reviewing the social and economic analysis on the local communities.

Sincerely,

Caren Cowan
Executive Director

O-006
R2

New Mexico Public Lands Council

P.O. Box 1416 / Hope New Mexico 88250
505.484.-3268 phone & fax / casabonn@pvtnetworks.net email

March 8, 2004

U.S. Fish & Wildlife Service
Southwestern Willow Flycatcher Coordinator
Arizona Ecological Services Field Office
2321 W. Royal Palm Road, Suite 103
Phoenix, Arizona, 85021

FAX: 602.242.2513

WIFLcomments@fws.gov

RE: Notice of Scoping Meetings & Intent to Prepare an Environmental Assessment for the Proposed Designation of Critical Habitat for the Southwestern Willow Flycatcher

Dear Sir:

On behalf of the membership of the New Mexico Public Lands Council (NMPLC), I am writing to comment on the above captioned court ordered designation of critical habitat for the southwestern willow flycatcher (SWFC). Thank you for this opportunity.

NMPLC is opposed to any designation of critical habitat that would impose an economic burden on rural families and communities within these areas. Potential designation maps show a broad expansion of critical habitat along the Rio Grande and Gila rivers that will have a negative effect on agriculture. Designation of critical habitat could have disproportionately high and adverse impacts on the minority and low-income populations residing in these areas if current agriculture practices are eliminated or curtailed. The majority of these maps show areas that are not being currently used as nest sites nor have the potential to become nesting sites in the foreseeable future. These areas should not be included within any critical habitat designation for the SWFC unless or until it is demonstrated that these areas are home to the birds.

E6 AG13 SY CH12

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AG4

New Mexico and the entire Southwest has been suffering a serious drought. With that drought, we have seen the dropping of water in our lakes and streams. NMPLC is extremely concerned about how the SWFC critical habitat designation will impact our water managers' abilities to rebuilding water storage in lakes and dams. The ability to hold water and cover lands not today covered by water will seriously impact New Mexico's ability to deliver water not only to agriculture producers in this state, but to meet court mandated water compacts with other states. SWFC critical habitat designation should not further harm New Mexicans and others dependent upon water storage at dams and lakes within the state.

W6

With that in mind, NMPLC is extremely concerned with the potential designation of the 100-year floodplain and ask for serious consideration before making such a move.

LX2

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AG13

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Incentives need to be used to entice more rural support for these types of efforts. Previous efforts of the ESA always have a negative impact. With incentives rather than punitive actions, agriculture producers could and would probably recover this species as well as any other endangered species. PR-11

Thank you for the opportunity to comment on this proposal and we look forward to reviewing the social and economic analysis on the local communities.

Sincerely,

Mike G. Casabonne/ee

Mike G. Casabonne
President

0-007
R2

NEW MEXICO WOOL GROWERS, INC.

Sustainable Agriculture Protecting The Environment & All Its Creatures

March 8, 2004

U.S. Fish & Wildlife Service
Southwestern Willow Flycatcher Coordinator
Arizona Ecological Services Field Office
2321 W. Royal Palm Road, Suite 103
Phoenix, Arizona, 85021

FAX: 602.242.2513

WIFLcomments@fws.gov

RE: Notice of Scoping Meetings & Intent to Prepare an Environmental Assessment for the Proposed Designation of Critical Habitat for the Southwestern Willow Flycatcher

Dear Sir:

On behalf of the membership of the New Mexico Wool Growers, Inc. (NMWGI), I am writing to comment on the above captioned court ordered designation of critical habitat for the southwestern willow flycatcher (SWFC). Thank you for this opportunity.

NMWGI is opposed to any designation of critical habitat that would impose an economic burden on rural families and communities within these areas. Potential designation maps show a broad expansion of critical habitat along the Rio Grande and Gila rivers that will have a negative effect on agriculture. Designation of critical habitat could have disproportionately high and adverse impacts on the minority and low-income populations residing in these areas if current agriculture practices are eliminated or curtailed. The majority of these maps show areas that are not being currently used as nest sites nor have the potential to become nesting sites in the foreseeable future. These areas should not be included within any critical habitat designation for the SWFC unless or until it is demonstrated that these areas are home to the birds. E6 AG13 S4 CH12

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New Mexico and the entire Southwest has been suffering a serious drought. With that drought, we have seen the dropping of water in our lakes and streams. NMWGI is extremely concerned about how the SWFC critical habitat designation will impact our water managers' abilities to rebuilding water storage in lakes and dams. The ability to hold water and cover lands not today covered by water will seriously impact New Mexico's ability to deliver water not only to agriculture producers in this state, but to meet court mandated water compacts with other states. SWFC critical habitat designation should not further harm New Mexicans and others dependent upon water storage at dams and lakes within the state. W6

With that in mind, NMWGI is extremely concerned with the potential designation of the 100-year floodplain and ask for serious consideration before making such a move. LX2

P.O. Box 7520 Albuquerque, NM 87194 Phone: (505) 247-0584 Fax: (505) 842-1766 2231 Rio Grande NW

NMWGI has serious concerns about the SWFC recovery plan as it conflicts with the recovery plan of the Rio Grande silvery minnow. One calls for the total elimination of salt cedar and the other calls for the protection of salt cedar at certain heights and density. One of the major problems with the Endangered Species Act (ESA) is that it is species specific and does take into account the entire ecosystem and the needs of all the components of that system. This in turn puts it into conflict with other species that are trying to be recovered. AG1

Given the scope of this proposal and the negative impact it will have on our members, and all New Mexicans, that reside in the proposed critical habitat areas, NMWGI respectfully requests that the U.S. Fish & Wildlife Service (FWS) produce an in-depth economic and social analysis on this designation and how it will affect rural families and communities, particularly minority populations. We stress the demand for a local analysis, not a national or even a state analysis, but one that describes those effects on the local communities within the proposed critical habitat areas. We would ask that any oral and written material produced by the FWS for this critical habitat designation be provided in both English and Spanish to ensure that all impacted citizens will have the opportunity to understand the process and its potential outcomes. PR71 PR66

Incentives need to be used to entice more rural support for these types of efforts. Previous efforts of the ESA always have a negative impact. With incentives rather than punitive actions, agriculture producers could and would probably recover this species as well as any other endangered species. PR11

Thank you for the opportunity to comment on this proposal and we look forward to reviewing the social and economic analysis on the local communities.

Sincerely,

Russell Leonard

Russell Leonard
President

Robert S. Lynch & Associates
Attorneys at Law

0-008
RI

Robert S. Lynch *
Paul M. Li

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Hon. Jim Hartdegen
Hon. Joe Lane

* Admitted to practice in Arizona and the District of Columbia

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FACSIMILE COVER SHEET

Date: March 8, 2004 Time: 5:16 PM

Please deliver the following pages to:

Name: Steve Spangle, Field Supervisor FAX: 602-242-2513
Arizona Ecological Services Office
Company: U.S. Fish and Wildlife Service

From: Robert S. Lynch

Total number of pages (including cover page): 3

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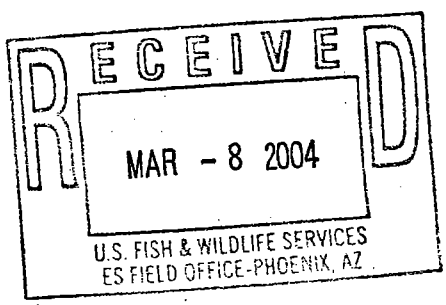
Remarks/Special Instructions:



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Please notify Peggy at (602) 254-5908 if you do not receive all of the pages.

Robert S. Lynch & Associates
Attorneys at Law

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Government Relations Associates **
Hon. Jim Hartdegen
Hon. Joe Lane

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TELECOPIED ONLY

March 8, 2004

Steve Spangle
Field Supervisor
Arizona Ecological Services Office
U.S. Fish and Wildlife Service
2321 West Royal Palm Road, Suite 103
Phoenix, Arizona 85021

Attn: Flycatcher NEPA Scoping

Dear Mr. Spangle:

Pursuant to the Federal Register notice of January 21, 2004, 69 Fed.Reg. 2940-3, I am submitting the following comments on the proposal for scoping the environmental impact statement for a proposed designation of critical habitat for the southwestern willow flycatcher in Arizona, California, Colorado, Nevada, New Mexico, Texas and Utah.

In scoping the proposal, you should eliminate any areas from potential critical habitat designation that are impacted by federal agency actions that are nondiscretionary in nature. The prime example, of course, is Lake Mead, as highlighted by the previous litigation specifically on this issue. Southwest Center for Biological Diversity v. U.S. Bureau of Reclamation, et al., 143 F.3d 515 (9th Cir. 1998). Where nondiscretionary actions of federal officials will force significant alteration in an area, it is entirely inappropriate to contemplate that area as being critical habitat. IE 7

In examining "historically" occupied areas (areas that previously were occupied but are not now occupied), the EIS must answer the question why these areas are no longer occupied. It may be that the willow stands in question have matured past their ability to be suitable habitat. In other words, the fact that the bird is not occupying a particular area now should lead to the inquiry about what is wrong with that habitat and can that lack of suitability factor be corrected. If so, at what cost? CH14

Where the area is dominated by salt cedar, which can maintain its complexity and suitability for nesting beyond the ability of willows to do so, the EIS must address current programs for removing salt cedar and the impacts of such removal programs in the short term as well as in the long term to the flycatcher. PR8

In examining the factors that have been attributed to declining flycatcher numbers, extraterritorial impacts in addition to loss of wintering habitat need to be examined. Given that this migratory bird spends only about a fourth of the year in the United States, factors impacting its migration as well as its wintering habitat obviously contribute to mortality. It is difficult to justify actions protecting habitat in the United States, especially habitat that isn't currently occupied during the nesting season, when extraterritorial effects outside the United States remain unquantified. PR36

This will be an especially important factor in situations where habitat is listed but not occupied. If such areas are subjected to the incidental take permit process under Section 10 of the Act, further controversy could result such as was the focus of Arizona Cattlegrowers' Association v. United States Fish and Wildlife Service, et al., 273 F.3d 1229 (9th Cir. 2001). Controversies over habitat will continue to divert scarce funds from beneficial activities that can actually help the species. PR16

Finally, I cannot believe that you are wasting your time and public money on doing an environmental assessment on this subject. You are proposing to designate critical habitat for this species in as many as seven states. To suggest that somehow you can do so with a finding of no significant impact rather than a full-blown EIS and record of decision is ludicrous. You should get on to the business of scoping the draft EIS and save us all time and money. PR32

Sincerely,
ROBERT S. LYNCH & ASSOCIATES

Robert S. Lynch

RSL:psr

0-009
R7

68 S. Main Street., Suite 400
Salt Lake City, Utah 84101

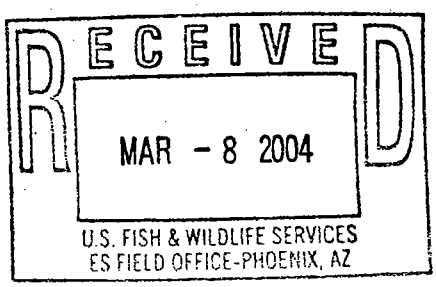
(801) 328-3550
WUP@XMission.com

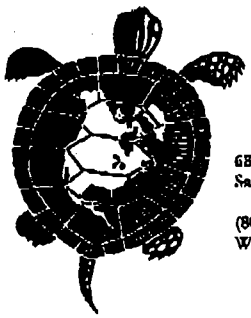
FAX COVER SHEET
FROM: Wild Utah Project Fax # 801/363-7283
Phone Number 801/328-3550

ATTENTION: Steve Spangle

Message: (03/08). Please accept these scoping comments from Wild Utah Project, Southern Utah Wilderness Alliance, and Red Rock Forests regarding critical habitat designations for the southwestern willow flycatcher in Utah.
Sincerely, Allison Jones

Allison Jones
Wild Utah Project
68 South Main St., Suite 400
Salt Lake City, UT 84101
Ph# 801/328-2550





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(801) 328-3550
WUP@xMission.com

March 5, 2004

Steve Spangle
Field Supervisor
Arizona Ecological Services Office
U.S. Fish and Wildlife Service
2321 West Royal Palm Road, Suite 103
Phoenix, AZ 85021

Dear Mr. Spangle,

Wild Utah Project, Southern Utah Wilderness Alliance, and Red Rock Forests submit the following scoping comments on the Fish and Wildlife Service's (FWS) intention to prepare an Environmental Assessment (EA) for the Proposed Designation of Critical Habitat for the Southwestern Willow Flycatcher. 69 Fed. Reg. 2940 (January 21, 2004).

The Wild Utah Project (WUP) seeks to restore and maintain our region's part of the Great Basin and Colorado Plateau ecosystems through the design and eventual establishment of a connected system of conservation networks. WUP also provides scientific and GIS support for Utah conservation organizations, which in turn builds effective relationships with Utah's scientific community, management agencies, and activists. The Wild Utah Project's mission is to bring together scientists and conservation activists to create and implement a region-wide program of conservation goals and plans that will protect ecological integrity, expand wilderness, restore and protect healthy ecosystems, and protect and restore our native wildlife - including large carnivores - within our local ecoregions. WUP also conducts riparian and grazing-related research, and has developed new methods for assessing the health of riparian areas. These last three facets of WUP's work directly implicates southwestern willow flycatchers.

Southern Utah Wilderness Alliance (SUWA) is a non-profit, conservation organization that advocates the preservation of the outstanding wilderness at the heart of the Colorado Plateau, and the management of these lands in their natural state for the benefit of all Americans. SUWA promotes local and national recognition of the region's unique character through research and public education; supports both administrative and legislative initiatives to permanently protect the Colorado Plateau wild places within the National Park and National Wilderness Preservation System or by other protective designations where appropriate; builds national support for such initiatives on both the local and national level; and provides leadership within the conservation movement through uncompromising advocacy for wilderness preservation. SUWA's members regularly use and enjoy the public lands occupied by, and suitable for, the southwestern willow flycatcher and are avid bird watchers. S1

Red Rock Forests' mission is the preservation of Utah's mountain islands in the heart of America's red-rock wilderness. Red Rock Forests relies on sound biological principles to guide its policy goals and decision-making, with a particular emphasis on conservation biology. Red Rock Forests uses citizen action, community organizing, and collaborative agreements, as well as legal challenges, to further its conservation mission. Red Rock Forests maintains a particular interest in the grazed lands of southern Utah. Red Rock Forest members and staff frequently visit Utah's public lands to hike, camp, observe wildlife, bird watch, photograph scenery, and find emotional and spiritual sustenance in the public lands of central and southern Utah.

Hereinafter Wild Utah Project, Southern Utah Wilderness Alliance, and Red Rock Forests are collectively referred to as "WUP."

GENERAL STATEMENT

The purpose of the Endangered Species Act (ESA) is "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved . . ." 16 U.S.C. § 1531(b). To accomplish this conservation mandate, FWS is required to designate critical habitat "on the basis of the best scientific data available." 16 U.S.C. § 1533(b)(2). Critical habitat refers to "the specific areas within the geographical area occupied by the species . PR161

. . on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection." 16 U.S.C. § 1532(5)(A)(i). Critical habitat also includes "specific areas outside the geographical area occupied by the species . . . upon a determination by the Secretary that such areas are essential for the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii).

PR16

Occupied and unoccupied southwestern willow flycatcher (SWWFL) habitats within Utah are appropriate for critical habitat designation. By definition, critical habitat is designated to accomplish conservation objectives, including recovery. Pursuant to the ESA, conservation means "to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to the [ESA] are no longer necessary." 16 U.S.C. § 1532(3). The designation of critical habitat within Utah accomplishes the ESA's objectives by ensuring the perpetuation and expansion of SWWFL populations at the north-central limit of SWWFL habitat. *See* Southwestern Willow Flycatcher Recovery Plan, at 9 (August 2002)(hereinafter "SWWFL Recovery Plan").

HE1

HE1

As WUP discusses below, occupied SWWFL habitat within Utah requires special management considerations or protection and is essential for the conservation of the species. Moreover, unoccupied SWWFL habitats are also essential to the conservation of the species given that the SWWFL Recovery Plan recognizes that the establishment of new populations is necessary for the species to recover. *See* SWWFL Recovery Plan, at 125. Existing protection measures do not provide a sufficient regulatory mechanism to ensure the continued viability and recovery of SWWFL in Utah

HE1

Accordingly, WUP respectfully requests that FWS designate occupied and unoccupied SWWFL habitat with Utah as critical habitat.

OCCUPIED HABITAT WITHIN UTAH IS ESSENTIAL TO THE CONSERVATION OF SOUTHWESTERN WILLOW FLYCATCHER

Historically, SWWFL occurred in river systems throughout Utah. SWWFL Recovery Plan at 9. However, recent surveys have found the SWWFL to be absent from much of its historical Utah range. Id. at 31. Instead, SWWFL in Utah appear to have been limited to small breeding numbers "along the Virgin River near St. George and single territories located at sites

in the Panguitch Lake area and within Bryce Canyon National Park." Id. at 32 (citations omitted). There are also some indication that there may be breeding occurring near Bicknell, and on the San Juan River in the 4-corners region, and this year's surveys hope to validate this (personal communication, Frank Howe, Utah Division of Wildlife Resources). The SWWFL could well occupy additional sites in Utah, but survey data are limited. In any case, the decimated nature of SWWFL populations within Utah highlights the necessity for the designation of occupied habitats as critical habitat.

HE1

According to the FWS Notice of Intent, the agency "intend[s] to utilize those areas identified as important stream reaches in the [SWWFL Recovery Plan] as a starting point in the process of identifying areas that may meet the definition of critical habitat." 69 Fed. Reg. at 2941. The SWWFL Recovery Plan identifies specific river reaches within Utah that should garner focus in the critical habitat designation because "[s]ubstantial recovery value exists in these areas of currently or potentially suitable habitat." SWWFL Recovery Plan, at 89 (Table 10). Specifically, within the Lower Colorado Recovery Unit, FWS recognized the enormous value of SWWFL habitats with the Virgin River Management Unit, much of which is located within Utah. Id. at 89. Importantly, FWS has stressed the importance of facilitating the establishment of new, large populations in the Lower Colorado Recovery Unit. Id. at 125.

FWS also recognized the "substantial recovery value" of SWWFL habitat within Utah in the Upper Colorado Recovery Unit. Id. at 88. Both the San Juan and Powell management units contain important river reaches within Utah. Id. As FWS has noted, these are the habitats "where recovery efforts should be focused." Id.

Furthermore, the SWWFL Recovery Plan acknowledges that "[c]onservation of all existing breeding sites and occupied habitats is crucial to recovery."[1] Id., at 124. *See also* Id., at 113 (stating the recovery objective to "increase the number of breeding pairs at small sites (especially those with 10 or fewer territories) to improve stability and colonization potential.") According to USGS's *Southwestern Willow Flycatcher Breeding Site and Territory Summary*, three SWWFL breeding sites and five territories are within Utah. United States Geological

[1] As FWS notes here, all occupied sites are not necessarily breeding sites.

Service, *Southwestern Willow Flycatcher Breeding Site and Territory Summary*, at 9 (2002), *available at:* http://www.usgs.nau.edu/swwf/Reports/Rangewide%20Status%20Report %202002%20Final.pdf. At a minimum, each of these breeding sites and territories must be designated critical habitat.

Applying the purpose of critical habitat designations, the ESA's definition of conservation, FWS's recognition of the recovery value to the SWWFL of Utah river reaches, and the presence of SWWFL breeding sites, designation of SWWFL critical habitat within Utah is "essential to the conservation of the species." 16 U.S.C. § 1532(5)(A)(i). As noted in Southwest Center for Biological Diversity v. Norton, the determinative factor constituting the necessity to designated specific habitat as critical "is whether or not the habitat is 'essential to the conservation of the species.'" 240 F.Supp.2d 1090, 1098 (D.Ariz. 2003). Accordingly, FWS should designate river reaches within Utah as SWWFL critical habitat.

That special considerations or protection measures are required for SWWFL habitat in Utah is acknowledged by FWS. *See* 16 U.S.C. § 1532(5)(A)(i). The definition of critical habitat requires designation of specific areas "which **may** require special management considerations or protection." 16 U.S.C. § 1532(5)(A)(i)(emphasis added). By using the term "may," a "plain reading of the definition of 'critical habitat' means land essential to the conservation of a species for which special management or protection is *possible*" must be designated as critical habitat. Southwest Center for Biological Diversity, 240 F. Supp.2d at 1098-1099. Certainly, FWS has the ability to designate SWWFL habitat within Utah as critical habitat. Moreover, the necessity for such an action is evidenced by FWS's recognition of habitat threats to SWWFL in Utah. According to the SWWFL Recovery Plan,

> Washington County, Utah, which is home to more than half of the Virgin River's length, has ranked among the nation's ten fastest-growing counties for the last for years. This growth in human community is facilitating detrimental uses of the Virgin River and its riparian resources. Fore example, a current proposal calls for a 60% reduction of the river's winter flow in the last reach where two endangered fish maintain relatively healthy populations. SWWFL Recovery Plan, at 53.

HEI

Furthermore, much of the public lands within the SWWFL's range in Utah are utilized for livestock grazing. Given FWS's understanding that "[b]reeding habitat for the [SWWFL] is

restricted to riparian ecosystems" and "livestock overgrazing has detrimental effects on riparian ecosystems," this dynamic provides another rationale as to why FWS is obligated to designated critical habitat within Utah. Id. at G-1.

Based upon FWS's previous documentation, designation of critical habitat in Utah for the SWWFL is appropriate and necessary. Therefore, WUP requests that all occupied SWWFL habitats within Utah be considered for, and ultimately, designated with Utah.

FWS SHOULD DESIGNATE UNOCCUPIED SWWFL HABITAT WITHIN UTAH TO PROMOTE THE RECOVERY OF THE SPECIES

As previously discussed, critical habitat designations facilitate the conservation of endangered and threatened species, which must be considered in terms of recovery. The SWWFL Recovery Plan recognizes the importance of unoccupied habitat to the recovery of the species by calling for actions to "establish new populations of large size (25 territories) in areas where few or no flycatchers exist . . ." Id. at 112. In fact, FWS acknowledged the importance of designating unoccupied habitat in the original SWWFL critical habitat designation. 62 fed reg 39129, 39133 (July 22, 1997) ("All areas contain some unoccupied habitat or former (degraded) habitat, needed to recover ecosystem integrity and support larger southwestern willow flycatcher numbers during the species' recovery.")

The designation of unoccupied critical habitat within Utah is further necessitated by the lack of survey data. By designating quality SWWFL habitat that has not been surveyed, FWS may be taking action to protect already inhabited areas. Frank Howe with the Utah Division of Wildlife Resources suspects that there may be more breeding pairs in the state than current survey efforts reflect (personal communication, March 2004). In addition, Howe suspects that more habitat that is suitable but currently unoccupied will become occupied once southern Utah emerges from the current drought and receives more moisture (personal communication, March 2004).

Yet another pressing reason to establish critical habitat in currently unoccupied habitat in Utah is based in pure concepts of conservation biology. Because there are so few breeding individuals in Utah compared to adjacent states such as Arizona, virtually all breeders in Utah

are more or less isolated from conspecifics that are breeding in the southern part of the species' range. Every effort should be made to enhance connectivity of these outliers with breeders across the border, and large patches of designated critical habitat in southern Utah could help achieve this. Moreover, it must be recalled that Utah represents the northern-most extreme of the known breeding range of SWWFL. This is significant because individuals at the edge of their range often possess slight genetic variation, or are more susceptible to conditions that can induce slight variation, in comparison to those at the core of the species' distribution (Frey 1993, Lesica and Allendorf 1995, Garcia-Ramos and Kirkpatrick 1997). This makes this outreaching breeding segment of SWWFL a dynamic focus of evolutionary change, in which those individuals may be more likely to survive and adapt to regional perturbations, or climate shifts. From an evolutionary perspective, populations at their distributional limits become extremely important to conserve.

HE1

A final, and arguably the most pressing, reason to designate critical habitat for SWWFL within currently unoccupied suitable habitat is the serious threat of urban encroachment within potential SWWFL habitat in Washington County. The population of Washington County has grown from 10,000 in 1950 to 85,000 today. In the next fifty years, the county's population is projected to increase from 85,000 to as much as 525,000. The Virgin River near St. George has already felt the impact of human development in and nearby the river corridor, and much more development can be expected in the coming years. The impacts of this development to SWWFL and its habitat along the entire course of the Virgin could be considerable, unless a large portion of the river and its tributaries are designated as critical habitat.

PR 8
PR 9

Based upon the need to establish new populations, the lack of survey data within Utah, the considerable isolation experienced by breeding birds in Utah, the evolutionary importance of breeders at the northern-most extent of the SWWFL range, and the considerable threat of urban encroachment in Washington County, FWS should designate unoccupied Utah SWWFL habitat within the species' historic range. Accordingly, WUP requests that FWS designate as SWWFL critical habitat unoccupied or unsurveyed portions of the species' historic range in Utah.

HE1

DESIGNATING SWWFL CRITICAL HABITAT IN UTAH WILL HAVE LITTLE ECONOMIC IMPACT

Most, if not all, SWWFL habitat in Utah is on public lands. Although economic activity may occur on these public lands, such activities are a privilege and not a right. Therefore, the economic costs of restricting activity on public lands to conserve the flycatcher are minimal. Pursuant to governing public land statutes, for example the Federal Land Management and Policy Act, lands shall be open to particular uses only where appropriate. Whether it is appropriate to use public land inhabited or necessary for the recovery of endangered species for economic activity will be determined through future interpretation of statutory mandates and through consultation with FWS. Therefore, any economic impact derives from Congress's intention of management priorities on public lands, and not from any critical habitat designation pertaining to public lands.

E19

CONCLUSION

For the aforementioned reasons, WUP respectfully requests that FWS designate all occupied SWWFL sites within Utah as critical habitat for SWWFL. Furthermore, WUP request that FWS designate substantial portions of rivers and streams in suitable habitat within the SWWFL's historic range in Utah as critical habitat. Such an action will have minimal economic impacts when balanced with the substantial progress that such designation will make towards recovery of the species.

HE1

E19

Allison Jones

Allison Jones, Conservation Biologist – Wild Utah Project

Jose Walker, Esq.
Attorney for Wild Utah Project, Southern Utah Wilderness Alliance, and Red Rock Forests

SCIENTIFIC LITERATURE CITED

Frey, J. 1993. Modes of peripheral isolate formation and speciation. Systematic Biology 42:373-381.

Garcia-Ramos, G., and M. Kirkpatrick. 1997. Genetic models of adaptation and gene flow in peripheral populations. Evolution 51:21-28.

Lesica, P. and F.W. Allendorf. 1985. When are peripheral populations valuable for conservation? Conserv. Biol. 9:753-760.

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R2

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March 8, 2004

Steve Spangle, Field Supervisor
Arizona Ecological Services
United States Fish and Wildlife Service
2321 West Royal Palm Road, Suite 103
Phoenix, Arizona 85021

SENT VIA MAIL AND FACSIMILE: 602-242-2513

Dear Mr. Spangle:

Defenders of Wildlife ("Defenders") is pleased to submit the following comments on the proposed redesignation of critical habitat for the Southwestern willow flycatcher. Defenders is a national, non-profit organization working to protect wildlife species and the habitat upon which they depend. On behalf of thousands of members in the southwestern United States, Defenders supports the redesignation of critical habitat.

As you are aware, the flycatcher is one of America's most endangered songbirds. The majority of remaining populations consist of fewer than ten pairs, placing the species in imminent danger of extinction. Because a primary threat to the flycatcher is the destruction of its habitat in southwest riparian areas, redesignation of critical habitat is crucial to the species' survival and recovery. It will provide important additional protection for the flycatcher, as it will ensure that federal agencies consult not only when the species is present, but also when there is designated critical habitat in an action area.

CH2

In addition to voicing our support for redesignation of critical habitat, Defenders makes the following recommendations on the scope of environmental analysis:

HE1

- First, we recommend that the critical habitat encompass a minimum of the 100-year floodplain. The critical habitat should include all currently and recently occupied flycatcher habitat; all unoccupied suitable habitat; and all areas identified by the Southwestern Willow Flycatcher Recovery Plan (2002) as important to recovery.

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Second, we recommend that the critical habitat be sufficient to allow recovery of flycatchers in a wider portion of their historic range. This can be accomplished by establishing two priorities. The first priority is to include areas within fifty miles of existing territories. This fifty-mile distance is the observed maximum dispersal distance of a flycatcher between breeding populations. The second priority is to include areas that would reconnect existing pockets of flycatcher populations. CH30

Third, and finally, we recommend that the critical habitat include riparian vegetation utilized by the flycatcher; aquatic environments, which are a primary source of insect prey for the flycatcher; and streambanks, which are necessary to support flycatcher habitat.

Thank you for your time and consideration, and thank you for the opportunity to comment. Defenders looks forward to continued involvement in issues relating to the Southwestern willow flycatcher.

Sincerely,

Kara Gillon
Water Counsel

KERN COUNTY FARM BUREAU, inc.

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O-011
R5

March 5, 2004

Field Supervisor
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RE: Designation of critical habitat for the Southwestern willow flycatcher

Dear Sir or Madam:

Thank you for this opportunity to present our comments regarding the NEPA process you are undertaking in the designation of critical habitat for the southwestern willow flycatcher, especially as it affects the operation and maintenance of Kern County's only major water reservoir, Lake Isabella.

The Kern County Farm Bureau is an agricultural organization representing farmers and ranchers operating in Kern County. We are concerned that restrictions imposed on farming and ranching activities in and around the reservoir would be detrimental to local landowners, the economy and are not necessary to promote a healthy population of all species including the flycatcher.

We believe this NEPA process should fully investigate and mitigate for the impacts of a critical habitat designation on farm and ranch operations, water supplies, the local economy and the environment. To date, these factors have not been adequately assessed. We would recommend that the Service work with Kern and other county governments and the local agricultural communities when preparing your economic analysis of the impacts of such a designation. It is clearly within the discretion of the agency to exclude lands from a critical habitat designation to avoid adverse economic consequences to the region. We believe excluding agricultural and water resources will not hamper recovery efforts, as it will lead to the greater implementation of cooperative solutions that will benefit the economy and the species.

E10

Background on Kern County Agriculture

1) California agriculture is battling for it very existence in the San Joaquin Valley and here in the Kern River Valley. Removal of land from production of food and fiber at the rate it is happening means that like our water supply, we will become dependent on imports from other states and foreign countries. Our members provide the consumer with the highest quality food that can be produced. Consumers can be assured that if it's grown in California, it's the best you can buy. We do not believe that an increased reliance on foreign products will prove beneficial for the economy or the environment. We are at a critical stage when it comes to the infrastructure needed to sustain this industry and the local economy. This infrastructure represents the suppliers, processors, shippers

E28

and retailers that work with agriculture to convert raw agricultural products into consumer goods. Already, this infrastructure has been harmed by a variety of factors that have retired agricultural lands. Any further restriction will lead to a loss of critical infrastructure that cannot be replaced. In this vicious cycle, it is the agricultural production that becomes impossible for many commodities meaning an even greater reliance of foreign products, while shutting down local economies. These economic and social consequences have not been analyzed sufficiently. E09

2) We fear the designation of critical habitat would eliminate much of the ranching in and around the lake. This is unnecessary. In areas with livestock production, no critical habitat designation is needed as this will impair the livestock sector's economic livelihood and will likely promote conversion to non-agricultural uses. We should seek cooperative solutions instead of regulation to address these issues. An example of where we could work together relates to the cowbird parasitism issue. Though the name might suggest otherwise, ridding an area of cattle will not eliminate this species. It has already been documented in the range of willow flycatcher habitat that the cowbirds can and do thrive where no livestock are present. We should employ control tools used in areas where livestock are not present, in the areas where they are present. This would eliminate any need to reduce livestock numbers. Should you choose to designate critical habitat on private lands used for agriculture, this cooperative approach cannot be implemented. E19

Lake Isabella

Lake Isabella reservoir irrigates nearly 300,000 acres of permanent and annual field crops valued at well over $400 million. In addition to being the drinking water for citizens of Bakersfield, water flows from the lake also support recreation and power generation. It also provides two other essential services to Kern County residents, water banking and flood control. W33

We believe the Isabella Reservoir can be operated at normal capacity and resume its role as a vital element in the California water conservation, delivery and flood control infrastructure. However, for this to happen the following must take place: E1C

1) The Service should review the science that has been gathered over the last three years as current physical conditions and scientific data may indicate that habitat within Isabella Reservoir is not critical to the flycatcher.

2) The service should work with local public agencies and landowners in the vicinity to develop a cooperative program to conserve and protect habitat for the flycatcher. This could include providing suitable habitat and the preservation of agricultural lands. R2W

3) The service should not adopt a rule designating critical habitat for Isabella Reservoir and South Fork as it will likely cause a counter-productive backlash potentially undermining positive conservation efforts. It will also prove harmful to the local economy, the preservation of agricultural lands and will adversely impact public health and safety. E1D H52

Other factors that must be considered in this NEPA process

1) The service must prepare a comprehensive economic impact study that takes into account information from local water agencies affected by the proposed critical habitat designation. E28

2) This economic analysis must fully demonstrate and mitigate for the impacts to a base industry of Kern County (agriculture) in cases where critical habitat designation impacts water flow or agricultural uses in any way. Again, this would include every one of the supporting businesses that helps turn raw agricultural commodities into products on the grocery shelves. E28

3) The economic analysis must consider the impacts to the local economy in order to be accurate and appropriate.

4) The loss of flexibility that will occur to manage water resources and its corresponding impact on water banking and flood control efforts. This impact to public safety has not been addressed. WTR

5) This NEPA process must consider the impacts to prime and all other soils used in agricultural production. The federal register notice only states that impacts to prime soils will be considered. Non-prime soils are essential to the community and local economy as they are used on a wide variety of industries including the production of livestock and many high value crops. AG1

6) The impacts, and most importantly, control measures for invasive species have not been addressed in this scoping document. We agree with the Service that non-native plant species like salt cedar greatly impact this species. Control of this and other non-native species should be considered as a preferred alternative over designating critical habitat. RV1D

7) Another example of control measures that would benefit the species would be a program to control the impacts of cowbirds. Currently, the service asks livestock producers to remove livestock to control this predator. This ignores the fact that cowbirds are found throughout the range of this species where livestock are NOT present. The control of this and other predatory species must be considered a primary goal of the Service and could be used in lieu of designating critical habitat in many areas. The key element in determining the success or failure with this type of approach is cooperation. Designating critical habitat will preclude the type of cooperation needed to achieve success, as regulations will get in the way of cooperative solutions.

8) An impact not covered in the scoping for this species needs clarification. We mentioned earlier the impacts to agriculture. A recent UC Berkeley Study showed that 87% of ranchers who use Sierra grazing allotments stated that regulations were the biggest impact to their grazing permits. When regulations are implemented, most of these ranchers said they would be forced to sell all or part of their home (base) ranch. Their biggest concern is the lack of suitable and available alternative forage in our state. This lack of available resources shows that the designation of critical habitat on lands utilized for livestock grazing will have devastating impacts to the economy, the environment and ranch families. E1E

9) It will also devastate the habitat of base ranches. We have seen a trend where the loss of livestock operations has led to the urban development of these areas. This conversion to urban uses may result in habitat fragmentation and other impacts not considered in this document. AG1

10) The proposed critical habitat should be discussed as it relates to livestock numbers. The Service should study the trend of livestock grazing within the range of this species over the past 50 years. We would contend that livestock grazing, which is listed as an "impact" to this species has declined significantly over the past 50 years. Ironically, this coincides with the decline in flycatcher AG4

numbers. We raise this issue to point out that preconceived notions and alleged "impacts" to this species have been vastly overstated. By shear numbers alone, the reduction of livestock grazing that has taken place in the range of this species should have resulted in an INCREASE in flycatcher numbers if your theories are correct. This clearly has not happened. AG

11) We believe the issues we have raised warrant the completion of an environmental impact statement (EIS). We do not believe the completion of an environmental assessment (EA) will provide the level of analysis needed to address the complex nature of the issues raised. PR3

Maybe it's time for a new approach. Working with Congress, maybe we can get the authorization to provide habitat for this species in a manner that does not harm area farms and ranches or related business, water supplies or any other industry. Designating critical habitat will harm the economy by further restricting one of the important base industries of Kern County, agriculture. E11

We believe that a more cooperative approach with the Service including working closely with local landowners and water agencies, can achieve the desired conservation goals necessary to preserve the willow flycatcher habitat and allow continued conjunctive use of all facilities. RV1

Thank you again for this chance to present these comments.

Sincerely,

Peter J. Belluomini
President
Kern County Farm Bureau

cc: The Honorable Bill Thomas, U.S. House of Representatives
The Honorable Cal Dooley, U.S. House of Representatives
The Honorable Richard Pombo, U.S. House of Representatives
The Honorable Dianne Feinstein, U.S. House of Representatives

0-012
RO

FAX

COVER SHEET

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SEND TO: USFWS	FROM: Bryn Jones
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URGENT ☐ REPLY ASAP ☐ PLEASE COMMENT ☐ PLEASE REVIEW ☑ FOR YOUR INFORMATION ☐

TOTAL PAGES, INCLUDING COVER: 3

COMMENTS:

Scoping comments for willow flycatcher.

CALIFORNIA
WILDERNESS
COALITION
The Voice for Wild California

March 8, 2004

Steve Spangle, Field Supervisor
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RE: Scoping Comments for Southwestern Willow Flycatcher Critical Habitat Designation

Dear Mr. Spangle:

The California Wilderness Coalition (CWC) thanks you for the opportunity to comment on the designation of critical habitat for the southwestern willow flycatcher. CWC has more than 4,500 members and more than 200 member organizations and business sponsors. It is the only organization dedicated to protecting California's wild places and native biodiversity on a statewide level. Through advocacy and public education, CWC builds support for threatened wild places, from oak woodlands to ancient forests and deserts.

Riparian areas are ecological keystones in California deserts, and are in tragic condition. The southwestern willow flycatcher is synonymous with these areas. Because the southwestern willow flycatcher is gravely endangered, designation of critical habitat that will ensure its survival and recovery is absolutely necessary. Critical habitat for the flycatcher should include the following:

- All currently and recently occupied flycatcher habitat.
- All areas identified as important to recovery in the Recovery Plan.
- Sufficient habitat to allow recovery of flycatchers to a wider and more viable portion of their historic range. Areas within 50 miles of existing territories, which approximates the observed maximum dispersal distance of a flycatcher between breeding populations, should be prioritized followed by areas that would reconnect existing populations across the landscape.
- Designated critical habitat should encompass a minimum of the 100-year floodplain.

HE1

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- Constituent elements of critical habitat should include riparian vegetation utilized by the flycatcher, as well as the aquatic environment, which is a primary source of insect prey for the flycatcher, and the streambanks that provide a necessary structural component supporting flycatcher habitat.

HE1

Thank you for your consideration of these comments. Please continue to inform us as to any decisions or developments related to this project.

Sincerely,

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ARIZONA MINING ASSOCIATION

0-013
R1

March 8, 2004

Mr. Steve Spangle
Field Supervisor
Arizona Ecological Services Office
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2321 West Royal Palm Road
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Phoenix, Arizona 85021

RE: Notice of Scoping Meetings and Intent to Prepare an Environmental Assessment for the Proposed Designation of Critical Habitat for the Southwestern Willow Flycatcher, 69 Fed. Reg. 2940 (Jan. 21, 2004).

Dear Mr. Spangle:

On behalf of the Arizona Mining Association (AMA), I am pleased to submit the following comments on the *Notice of Scoping Meetings and Intent to Prepare an Environmental Assessment for the Proposed Designation of Critical Habitat for the Southwestern Willow Flycatcher*, published in the Federal Register on January 21, 2004.

The AMA was established in 1965 as a non-profit business league. Current members are: ASARCO Incorporated; BHP Copper, Inc.; Carlotta Copper Company; and Phelps Dodge Corporation. In 2002 the member companies produced 67% of the nation's newly-mined copper, along with significant amounts of associated by-products - gold, silver, and molybdenum with a direct and indirect impact on the Arizona economy of $3.102 billion. The copper industry in Arizona directly provided jobs for 6,200 people in that same year.

AMA provides these comments in accordance with the relevant provisions of the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.*, the Endangered Species Act ("ESA"), 16 U.S.C. § 1531, *et seq.*, and U.S. Fish and Wildlife Service's ("FWS") own regulations regarding the designation of critical habitat. These comments will provide an overview of the pertinent statutory and regulatory constraints and will identify a list of issues that should be considered by FWS in the mandated NEPA process.

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I. Definition of Critical Habitat.

Critical habitat is defined as:

(1) The specific areas within the geographical area occupied by the species at the time it is listed on which are found those physical or biological features which are (i) *essential* to the conservation of the species and (ii) which may require special management considerations or protections; and

(2) Specific areas outside the geographical area occupied by the species at the time it is listed that are determined to be *essential* for the conservation of the species.

16 U.S.C. § 1532 (5)(A); *see also* 50 C.F.R. 424.12(b).

The designation of critical habitat outside the geographic area occupied by the species should be rarely undertaken and determinations of such should receive close scrutiny. *See* H. Rep. No. 1625 at 18 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9453, 9468 ("the Secretary should be extremely circumspect in the designation of critical habitat outside of presently occupied area of the species"). Accordingly, areas outside of the geographic area occupied by the species should be designated as critical habitat "only when a designation limited to its present range would be inadequate to ensure the conservation of the species." 50 C.F.R. § 424.12(e). HE2

Because riparian habitat has been identified as being important to the southwestern willow flycatcher ("SWWFL"), the scoping notice stated that that FWS has "recognize[d] due to the dynamic nature of riparian habitat, that designating the 100-year floodplain may be appropriate." 69 Fed. Reg. at 2941. 100-year floodplains associated with streams or wash channels often do not contain the primary constituent elements of suitable habitat, and as such, would be outside the geographical area known to be occupied by the SWWFL. In light of the fact that a 100-year floodplain may well encompass hundreds of acres, FWS must give due consideration to the notion of designating such on expansive and unwarranted area. AMA asserts that such a finding is not supported by the best available science and cannot be sustained. 2X3

II. Use of Best Available Science.

The FWS must also use the best scientific data available when designating critical habitat. 16 U.S.C. § 1533(b)(2). In reviewing the best scientific data available, FWS may consider, without limitation, "scientific or commercial publications, administrative reports, maps or other graphic materials, information received from experts on the subject, and comments from interested parties." 50 C.F.R. § 424.13. While this might include the consideration of some of the data contained in the *Final Recovery Plan, Southwestern Willow Flycatcher*, August 2002 (hereafter, the "Recovery Plan"), the Recovery Plan does not solely represent the best scientific data available because the role of recovery planning under the ESA is simply different than that of critical habitat designation. CH 22

Recovery plans do not alter the standards and requirements that apply to the designation of critical habitat. *See Fund for Animals, Inc. v. Rice*, 85 F.3d 535, 547-48 (11th Cir. 1996) (rejecting challenge to FWS biological opinion based on recovery plan's habitat preservation plan). The ESA does not allow the designation of "recovery habitat" through the critical habitat designation process. *Compare* 16 U.S.C. § 1533(a)(3) *with* 16 U.S.C. § 1533(f) (recovery plans). Critical habitat designations alone cannot, and are not, intended to achieve recovery. By using a recovery standard as the basis for the critical habitat designation, the FWS would improperly place the burden of recovering the SWWFL on select landowners, rather than on society as a whole as contemplated by the ESA. *See* 16 U.S.C. § 1533(f)(1).

In short, there is a fundamental distinction between formally designating critical habitat in accordance with the regulatory requirements imposed by Congress and undertaking discretionary efforts to protect "suitable" or "potential" habitat under the guise of recovery planning. Given these differences, the contents of a SWWFL Recovery Plan should have little bearing on a critical habitat designation, particularly when the data relied upon in the Recovery Plan has been superseded by newer reliable data or particular data was omitted from the Recovery Plan with little basis for doing so. RV5

In that regard, during the FWS scoping meeting, held in Phoenix on January 26, 2004, several participants referenced various studies completed by both federal agencies and private parties that posted-dated the Recovery Plan. For example, the Bureau of Land Management ("BLM") stated that significant surveys clarifying the status and location of the species have been completed in the last two years. It has been well established that the SWWFL is more hardy and adaptive than previously thought, even making its home in some cases in invasive salt cedar environments. Studies documenting these occurrences must be considered as a part of the best available science.

Finally, the FWS must give some consideration to the status of the SWWFL in its winter habitat. As the SWWFL is a neo-tropical migratory species, there may be impacts occurring in its over-wintering habitat that may not be ameliorated by the most-well intentioned conservation effort in the United States during nesting season. PR35

III. Economic Impacts.

In contrast to the various considerations relevant to listing determinations, FWS must consider the economic impacts of the proposed designation of critical habitat for the SWWFL. *See* 16 U.S.C. § 1533(b)(2). That analysis must include a thorough evaluation of the economic impact of "specifying any *particular area* as critical habitat." 16 U.S.C. § 1533(b)(2) (emphasis added). This requires analysis of the local economic impacts that result from each area designated as critical habitat. FWS regulations mandate that when considering the economic impacts, and other relevant impacts of the proposed designation of critical habitat, that: E18

> [FWS] shall identify any significant activities that would either affect an area considered for designation of critical habitat or be PR162

likely to be affected by the designation, and shall, after proposing designation of such an area, consider the probably economic and other impacts of the designation upon proposed or ongoing activities.

PR 162

50 C.F.R. § 424.19. FWS may then use the results of this analysis to exclude areas from critical habitat if it concludes that the "benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat." 16 U.S.C. § 1533(b)(2) (emphasis added).

PR 163

The economic impacts of the designation of critical habitat must be considered even if those impacts first arose as a result of the listing of the species or are attributable co-extensively to other causes. *New Mexico Cattle Growers Association v. U.S. Fish and Wildlife Service*, 248 F.3d 1277 (10th Cir. 2001). As FWS is well aware, *New Mexico Cattle Growers* invalidated the previously designated critical habitat for the SWWFL and it is incumbent upon the agency to conduct a thorough, reasoned and fair analysis.

The economic analysis must include consideration of the impacts on industry (including mining), agriculture, current or proposed land uses and on water use and availability. Most of these economic impacts resulting from a critical habitat designation are directly attributable to the Section 7 consultation process under the ESA and occur in circumstances where a project proponent requires a federal permit. For example, in the mining industry, consultations between permitting agencies and the FWS commonly result in drawn-out negotiations between a project proponent and the agency. In some cases, the negotiation process is completely unwarranted as no species are often present in the critical habitat areas that precipitated the consultation. Increased permitting costs, multiple years of required data collection and surveys, and the imposition of unreasonable mitigation measures, in the form of land set-asides, off-site purchases and conservation restrictions, often result. A proper valuation of these real costs and the commensurate benefit to the species as a result of the commonly imposed "mitigation measures" must be a component of the NEPA documentation.

E18

IV. NEPA Process and Documentation.

The 10th Circuit has clearly stated that designations of critical habitat must undergo NEPA analysis. *Catron County Board of Commissioners v. U.S. Fish and Wildlife Service*, 75 F.3d 1429 (10th Cir. 1996). Where such designation has significant impacts on the human environment, such as affecting industry, current and proposed land uses, local economies, and private land, an environmental impact statement ("EIS") is warranted. *Id.* at 1438.

PR32

A. Background on NEPA's Review Requirements.

NEPA was drafted to ensure that federal agencies "carefully consider detailed information concerning significant environmental impacts" of their actions. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). NEPA mandates the preparation of EIS for all "major federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(c); 40 C.F.R. § 1502.3. If there are substantial questions regarding whether a proposed project will have significant effects, an EIS *must* be prepared. *E.g. LaFlamme v. FERC*, 852 F.2d 389, 397 (9th Cir. 1988) (emphasis added).

PR32

Under regulations promulgated by the Council on Environmental Quality ("CEQ"), the term "significantly" requires consideration of both the context and the intensity of the effects of the proposal. 40 C.F.R. § 1508.27. With respect to the proposal's context, the definition of "significantly" provides that "in the case of a site-specific action, significance would usually depend on the effects in the locale rather than in the world as a whole. Both short and long-term effects are relevant." 40 C.F.R. § 1508.27(a). With respect to intensity, the CEQ regulations instruct that a variety of different factors should be considered, including:

PR 32

- Impacts that may be both beneficial and adverse. *A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial*; and
- *The degree to which the effects on the quality of the human environment are likely to be highly controversial*; and
- The degree to which the possible effects on the human environment are *highly uncertain or involve unique or unknown risks*; and
- The degree to which the action may establish a *precedent for future actions with significant effects* or represents a decision in principle about a future consideration.

PR 164

See 40 C.F.R. § 1508.27(b) (emphasis added).

B. Identification of Significant Impacts.

As the SWWFL critical habitat designation is likely to: (i) cause both beneficial and adverse consequences; (ii) be highly controversial; and (iii) involve unique or unknown risks in the form of economic impacts, a determination of significance is warranted as is the preparation of an EIS.

PR 32

Specifically, the designation of critical habitat will adversely impact existing and future land uses in riparian areas, as well as water diversions pursuant to well-established property rights along miles of riparian areas and the operation of reservoirs that provide water to thirsty municipalities. The controversial nature of a proposed designation of critical habitat has already been proven in the litigation that precipitated the re-designation of critical habitat for the SWWFL. 40 C.F.R. § 1508.27(b)(4). And the unique and unknown risks of the identified impacts cannot be fully known or understood without the detailed analysis included in an EIS. 40 C.F.R. § 1508.27(b)(5).

E18

The scoping notice presupposes the preparation of an environmental assessment (EA) in lieu of an EIS. The AMA encourages the FWS to conduct an EIS in the first instance to avoid legal challenges to the adequacy of the NEPA documentation and practical challenges related to the court order timeframes for the proposed and final designations. If the FWS performs an EA

PR 32

and a finding of no significant impact does not result, FWS would face serious time constraints in completing the required EIS evaluation in the limited time (i.e., September 30, 2004) that remains to comply with the existing court ordered deadline for a proposed designation. PR 32

V. Effects on Prior Existing Agreements.

Finally, the AMA would like to encourage the FWS to consider the effect that existing voluntary conservation agreements, habitat conservation plans and mandated Section 7 conservation measures are having on the SWWFL. These numerous voluntary and mandated conservation practices in place may supplant the need for critical habitat designations in many instances. In addition, voluntary conservation efforts should not be hampered by the severe economic impacts and restrictions from a designation of critical habitat. PR 13

Again, in accordance with the statutory and regulatory provisions that allow FWS to exclude certain areas from designation, FWS must weigh the benefits of exclusion of these already protected areas versus the benefits of inclusion. *See* 16 U.S.C. § 1533(b)(2) and 50 C.F.R. § 424.19. Where the benefits of exclusion outweigh the benefits of inclusion and such exclusion will not result in the extinction of the species, FWS should exclude those areas from the proposed designation of critical habitat. *Id.* CH 15

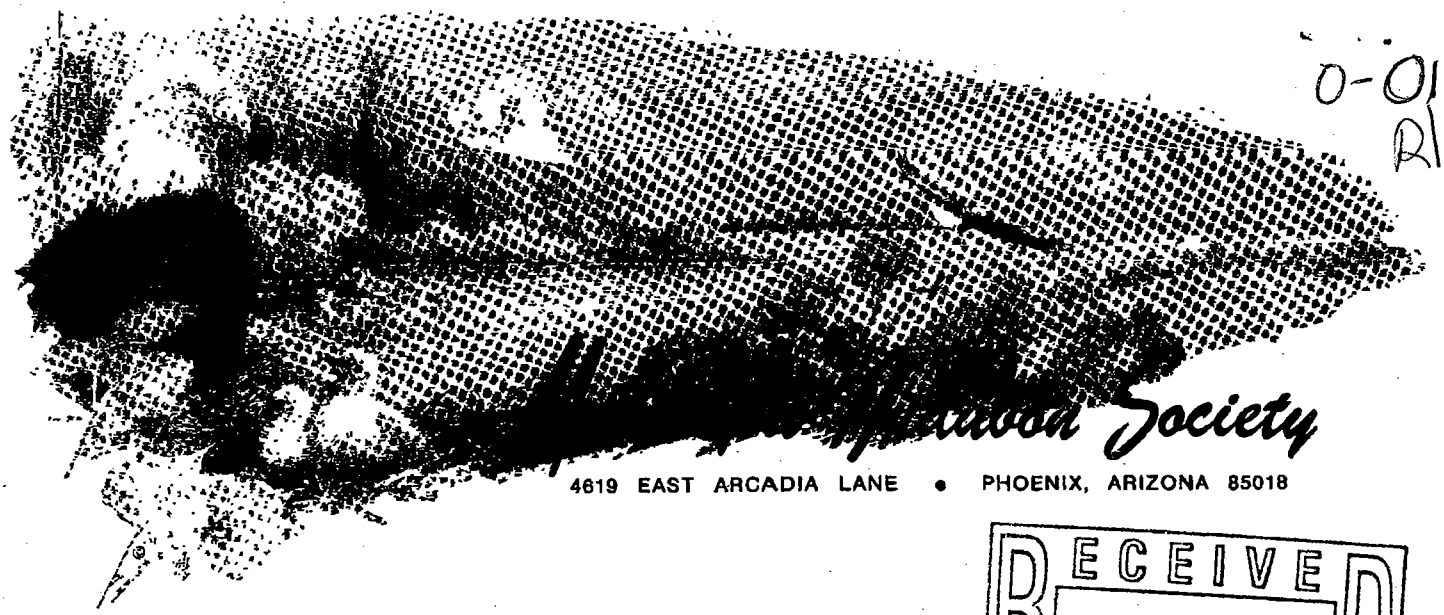
The AMA would like to thank the FWS for the opportunity to comment on these important issues and we look forward to further participation in the NEPA process as it continues.

Sincerely,

June Castelhano / for

Jay Spehar, Chairman
Public Lands Committee
Arizona Mining Association

0-014
R1



4619 EAST ARCADIA LANE • PHOENIX, ARIZONA 85018

January 27, 2003

Field Supervisor, USFWS
2321 W. Royal Palm Rd., Suite 103
Phoenix, AZ 85021

Re: Environmental and Economic Comments for Scoping Document, Southwestern Willow Flycatcher Habitat Designation

Dear Supervisor:

It is important that critical habitat be designated for the Willow Flycatcher (WIFO). Without such designation efforts to bring this species from the brink of extinction are difficult, at the least.] CH2

Because both economic and environmental factors which impact WIFO critical habitat must now be documented and described, the following points need to be stressed:

1. Removal of cattle by voluntary retirement from public lands would save the U.S. taxpayer money and simultaneously benefit WIFO habitat. It costs more to manage and operate the federal lands for grazing, than the revenues which accrue from AUM receipts. It is important to note that $1.35 AUM's are below the $5.00-$15.00 price of comparable private land leases throughout the eleven western states.
2. Cattle should be prevented from foraging in streams, but just as important, from the uplands above those vulnerable streams. Overgrazing in the uplands causes rapid run-off and downstream flooding of the watershed, and subsequent "blow-outs" of cottonwood and willow vegetation. While cyclical renewal from flooding is a normal process, cattle intensify the process to such an extent that major wash-outs occur more frequently.
3. Overgrazing in the uplands above the riparian habitat also decreases groundwater recharge. A suitable water table enables the creation and maintenance of landscape-wide springs and seeps as well as a more uniform and stable riparian habitat.

] AG2

4 Fishermen, tourists, nature lovers, wildlife watchers, -- just plain citizens-- all suffer when streams are degraded, silted and algae-laden. No fishery resource can thrive in the arid Southwest when the water is overheated from sun due to lack of stream canopy. No fishery can benefit when cattle urine and feces accumulate and cause eutrophication in those hot, un-shaded, algal-blooming, stream bank-eroded (by cattle hooves etc.) watercourses. WF16

5 Bald Eagles and other threatened and unique fish and wildlife suffer as a result. Bald eagles prefer trees to hot cliffs for nest sites in the arid Southwest. But when the trees have been destroyed by cattle and their food supply has also been destroyed by cattle, they are no longer able to thrive. The public may not be able to make field identification of WIFOS, but they enjoy the thrilling sight of a Bald Eagle, as well as the other birds, mammals, fish and vegetation associated with those dynamic, productive desert rivers here in the Southwest. They are encouraged to know the WIFOS, the Western Yellow-billed Cuckoos and other threatened riparian species can survive there. WF17

6. Retirement of public lands ranching would save taxpayers money as well as riparian habitats. The recently introduced legislation of U.S. Rep. Raul Grijalva et. al. allowing voluntary buyout of public lands permittees would save taxpayers the expenses of public lands management costs and subsidy payments. More importantly, it would aid and restore our rivers here in the Southwest. These fragile riparian environments provide habitat for 90% of this state's wildlife at some time in their life cycles. WF18

7. Experimental re-regulation of flood flows has taken place on the Colorado River. It needs to be undertaken with regularity on all dams where feasible. Below Horseshoe and Bartlett Reservoirs in Arizona are areas where this should be considered. Re-regulation is long overdue. Other states in the Southwest WIFO's habitats have dams where re-regulation could restore quality deciduous riparian habitat. W20

Wildlife resources have a great value to all sectors of the economy in the Southwest. It is not just the recreationists and outing sectors, the fishermen and the birdwatchers, but all those who want to live or visit the arid Southwest and who use and benefit from the water resources which accrue from our watercourses. E13

For example, almost half of the water consumed in Arizona is used to grow alfalfa and feed grains. Cattle are often fed hay in the winter or in summer drought events and when they are fattened before slaughter. However, hay can be grown by natural rainfall in every U.S. state.

79-80% of Arizona's water is used for a commodity which produces only 1% of the gross state product of that state. Federally subsidized groundwater pumping for agriculture has depleted riparian water tables statewide. Alfalfa hay and feed grains (almost 50% of Arizona's annual water use) can be grown by rainfall nationwide. Yet federal water projects (dams, diversions, groundwater pumping using federally subsidized electric rates) at great taxpayer cost, have created a highly subsidized agribusiness industry in the arid Southwest at the expense of both taxpayers and agribusiness elsewhere in the U.S. Consequently, our rivers, streams, watercourses, and wetlands could be flowing once more if agriculture were no longer subsidized and moved (by free enterprise) to where the rain falls. AG8

Municipal and industrial users only consume 20% of this state's water. The necessity or scare tactics of water "shortages" are the result of the subsidized industry that uses the 80%. Not those 20% M&I users. There is a flagrant abuse and misallocation and artificial "shortage" of those resources due to federal subsidies. WF12

To compound this attack upon our riparian habitats, consider that all federal public land grazing (BLM, USFS at below-market AUM's) in the eleven western states produces only 2% of the nation's cattle forage and livestock. WF19

Please address these comments in your environmental and economic analysis and in your upcoming NEPA documents on the WIFO. Keep us on your mailing lists by USPO.

Sincerely,

Robert E. Witzeman

Robert Witzeman, M.D., Conservation Chair
Maricopa Audubon Society

0-015
R1

arizona municipal water users association

4041 north central avenue • suite 900 • phoenix, arizona 85012 • phone (602) 248-8482 • fax (602) 248-8423

March 5, 2004

Mr. Steve Spangle
Arizona Ecological Services Field Office
U.S. Fish and Wildlife Service
2321 West Royal Palm Rd, Suite 103
Phoenix, Arizona 85021

Dear Mr. Spangle:

On January 21, 2004, the U.S. Fish and Wildlife Service (Service) issued a notice of scoping meetings and intent to prepare an environmental assessment for the proposed designation of critical habitat for the southwestern willow flycatcher (Federal Register 69:2940-2943). The Arizona Municipal Water Users Association (AMWUA) provides the following comments in response to the above notice. In general, these comments reiterate points made in a June 13, 2002 letter from AMWUA in response to a May 2, 2002 letter from the Service requesting comments on new critical habitat designation for the southwestern willow flycatcher.

The AMWUA members have a significant interest in the designation of critical habitat for the southwestern willow flycatcher. The AMWUA member cities of Chandler, Gilbert, Glendale, Mesa, Peoria, Phoenix, Scottsdale, and Tempe have rights to use water stored in the original conservation space behind modified Roosevelt Dam and delivered by the Salt River Project. Additionally, the cities of Chandler, Glendale, Mesa, Phoenix, Scottsdale, and Tempe have rights to water stored in the new conservation space (NCS), which was created when the Roosevelt Dam was modified. To obtain these rights to NCS water, these cities paid a proportionate share, approximately $44 million, to increase the height of Roosevelt Dam. The cities have also obtained permits to appropriate the NCS water pursuant to Arizona state law. Additionally, along with the U.S. Bureau of Reclamation, these cities have shared the cost of complying with the reasonable and prudent alternative mandated by the Biological Opinion issued by the Service in 1996 for modified Roosevelt Dam. Please be advised, that the AMWUA member cities may also be filing their own individual comments on this issue.

Our current comments involve four general issues:

1) that any designation of critical habitat be biologically and legally feasible and that the Service provide sufficient documentation for its conclusions;
2) that critical habitat is designated on an appropriate scale;
3) that areas covered by existing flycatcher-specific management plans should generally be excluded for designation as critical habitat; and

4) that the Service adequately identifies the economic impacts of the proposed critical habitat designations. E18

Biological and Legal Feasibility

The definition of critical habitat requires that any area proposed for designation must be shown to be essential for the conservation of the species. The mere presence of southwestern willow flycatchers alone does not meet that criterion. Critical habitat must be limited to areas that can be shown to have very high probabilities of supporting viable southwestern willow flycatcher populations now or in the future. General references to broad areas that might have the potential to support the species in the future are insufficient to support critical habitat designation. We are especially concerned about designation of areas that might be considered "unoccupied suitable habitat" or, especially, "potentially suitable habitat" as defined in the final recovery plan for the southwestern willow flycatcher. "Potentially suitable habitat" is defined in the Final Southwestern Willow Flycatcher Recovery Plan as "...a riparian system that does not currently have all the components needed to provide conditions suitable for nesting flycatchers, but which could - if managed appropriately - develop these components over time." It is incumbent upon the Service to demonstrate and document that any such areas proposed for critical habitat have a very high potential to become occupied by southwestern willow flycatchers and that the "appropriate management" be physically, legally, and economically feasible - not just theoretically possible. L065

Appropriate Scale

We believe that the specific stream reaches designated as critical habitat for the southwestern willow flycatcher in 1997 and many of the areas designated as Management Units in the Final Southwestern Willow Flycatcher Recovery Plan are too large to be proposed as critical habitat. These large areas typically contain diverse physical and hydrological conditions and include areas that meet the definition of "unsuitable habitat" contained in the Final Southwestern Willow Flycatcher Recovery Plan (e.g., the bank-stabilized sections of the Santa Cruz River through Tucson). Many also contain areas with significant restrictions on "appropriate management" resulting from current land and water uses that are highly unlikely to be changed (e.g., much of the lower Colorado River channel, and the Verde River below Bartlett Dam). We believe that the Service should refine its proposed designation of critical habitat to a much finer scale taking these considerations into account. CH29

Similarly, lateral boundaries of designated critical habitat should not be extended to the edge of the 100-year floodplain. Only small portions of the 100-year floodplain along suitable watercourses typically support riparian vegetation and only small portions of that riparian vegetation is typically suitable for southwestern willow flycatchers. Inclusion of the entire 100-year floodplain ensures that the vast majority of designated critical habitat will not support southwestern willow flycatchers at any given time and that much of it will never support southwestern willow flycatchers. This is especially true in areas with agricultural, industrial, or residential development in the floodplain. An obvious example is the Salt River from Granite Reef Diversion Dam downstream to the confluence with the Gila River, and the Gila River from the confluence with the Salt River downstream to Gillespie Dam. Existing land use in the 100-year flood plain, for the most part, consists of sand and gravel mining operations and irrigated agriculture. LX4

Such a designation is likely to have significant economic consequences and provide little additional benefit to the conservation of the species. Designating the lateral extent of critical habitat to the 100-year flood plain from the edge of areas with surface water, as done in the 1997 critical habitat determination, will significantly increase the amount of area but will not necessarily contribute to conservation of the species. According to the Final Southwestern Willow Flycatcher Recovery Plan (p.11), the best available scientific information indicates that "In almost all cases, slow-moving or still surface water and/or saturated soil is present at or near breeding sites during wet or non-drought years." A 100-meter boundary, but not beyond the edge of the active floodplain, may be sufficient to include the vast majority of suitable habitat even in dynamic riparian systems since the 100-meter boundary moves with the edges of surface water. However, it should be noted that as the stream moves, the lateral extent of any boundary will likewise move, and create future uncertainty. Alternatively, a depth to groundwater criterion of five feet may eliminate this latter uncertainty. LX4

Areas Covered by Existing Flycatcher-Specific Management Plans

Some areas covered by existing flycatcher-specific incidental take permits should generally be excluded from designation as critical habitat because incidental take is permitted in those areas, such as Roosevelt Lake. However, in those cases where a management plan, such as a habitat conservation plan, provides for the purchase of lands, which will be permanently managed as southwestern willow flycatcher habitat, then these mitigation lands, arguably, should be considered for designation as critical habitat. PR15

Economic Impacts

The economic impact of critical habitat designation is crucial. Any analysis should carefully examine, on a site-specific basis, the economic impact of the designation of a specific habitat. In other words, if a specific stream segment is proposed for designation, then the analysis should focus on the water users, recreational users, and other users of that stream segment, and the costs and benefits of designation to these users. It would not be appropriate to dilute this specific analysis by using a macro level, region-wide, gross impact analysis, where the costs to a specific set of users for a specific designation is lost in the "noise". It is important that the Service develop a detailed methodology for analyzing the economic impacts of critical habitat designation, and provide for the public review and comment of the methodology before implementation. E20

We, again, appreciate the opportunity to submit these comments on an issue that is critically important to the AMWUA member cities.

Sincerely,

V. C. Danos, P.E.
Program Manager

0-016
R2

Comments of
Elephant Butte Irrigation District
(New Mexico)
on U.S. Fish and Wildlife Service's
Notice of Intent to Prepare Environmental Assessment
for Proposed Designation of Critical Habitat for the
Southwestern Willow Flycatcher

The Elephant Butte Irrigation District ("EBID") delivers irrigation water to over 8,000 water right owners in Southern New Mexico, from south of Elephant Butte and Caballo Reservoirs to the Texas-New Mexico state line. Elephant Butte Reservoir stores EBID's water supply, and it is operated by the Bureau of Reclamation. EBID is concerned about an overreaching designation of critical habitat for the Southwestern Willow Flycatcher (SWF) and its comments are stated herein.

EBID urges the FWS not to designate critical habitat within the storage area of the Elephant Butte Reservoir. The prior designation of SWF critical habitat did not include any areas within Elephant Butte Reservoir, nor any area along the Rio Grande. The new designation should not either. Elephant Butte Reservoir stores water for irrigated agriculture in Southern New Mexico and for both agricultural and municipal purposes in the El Paso area of far West Texas. The Reservoir is also essential for the regulation and storage of water to fulfill the United States' international treaty commitments with Mexico, which annually is entitled to 60,000 acre feet delivered at the headgate of the Acequia Madre in Cuidad Juarez, Mexico.

The Reservoir stores water for use over a number of years, so its capacity should not be limited by the temporary presence of habitat for the SWF within the storage area. Water

levels in the Reservoir rise and fall depending on inflow from the Rio Grande. Any habitat favorable to the SWF which is created due to conditions resulting from the rising and shrinking of the lake level is only temporary. Temporarily occupiable SWF habitat within the reservoir should not be considered part of its "critical" habitat, because of its ephemeral nature.

EBID's concerns arise from the Notice, which states that the new SWF critical habitat will be designated within the "important stream reaches" identified in the Recovery Plan. One of those reaches extends to Elephant Butte Dam from the north, and another extends from the Dam to the New Mexico-Texas state line. EBID's concerns are also heightened due to the Recovery Plan's goal to expand the number of known SWF territories from 51 to 100 in the Middle Rio Grande and from 6 to 25 in the Lower Rio Grande.

Should FWS consider a designation of critical habitat of any areas within the Elephant Butte Reservoir, it must make a full evaluation of all of the effects of such a designation. Such a designation could limit the ability to store water in the Reservoir and this would have a dramatic effect on local economies. A full evaluation of the effects would show that the costs of such a designation would far exceed its benefits, thereby requiring the area's exclusion as critical habitat.

The water rights within the New Mexico portion of the Rio Grande Project are owned by the constituent members of EBID. These are vested property rights under state law and under the U.S. Constitution are protected against takings without due process. See, Tulare

Lake Basin Water Storage District v. United States, 49 Fed. Cl. 313 (2001). No federal agency owns or controls any water rights within the Project in New Mexico. The right to store water in the two Reservoirs is essential to exercise and use of these water rights. The FWS is bound to undertake a complete Takings Implications Analysis if its proposal to designate critical habitat impacts private water rights.

The area served with water from the Elephant Butte and Caballo Reservoirs is one of the poorest in the country and includes a high percentage of hispanic and other minority people. A majority of EBID's members are hispanic. In preparing NEPA and ESA documents, federal agencies, such as the International Boundary and Water Commission, have ignored or severely downplayed the environmental justice criteria they must analyze under Executive Order 12898. The FWS should not do the same.

Environmental measures should not cause disproportionate impacts on low-income and minority populations. Restrictions on water uses and water storage caused by SWF critical habitat designation could severely impact the people and the economy of this area. If water cannot be stored and used and is thereby lost, the beneficial uses that this water is ordinarily put to would also be lost. The loss of a dollar's output from a local farm is felt many times over in the local economy, since the farmer spends the dollar earned on goods and services in this area. If that dollar is never earned, its absence ripples through the local economy because no other person or business will ever earn it. The federal government should not be in direct competition with local productive uses for water or other resources

for threatened or endangered species. Removal of productive uses of water from the local economy worsens an economic situation that is already bad. FWS must analyze the full effect of its proposed actions upon their impact on local economies, particular under environmental justice requirements. S4

The FWS should also examine the full impacts of any proposed critical habitat in light of current drought conditions in Southern New Mexico. Drought exacerbates the competition for water, and federal agencies certainly should not foster nonproductive uses of water in drought periods. Currently, drought plagues the Southwest and water levels are extremely low at Elephant Butte and Caballo. The ability to refill these Reservoirs without impediments created by temporary SWF habitat is crucial to the economic and social sustenance of Southern New Mexico. E11

FWS should additionally evaluate impacts of any designation within Elephant Butte Reservoir on public recreation benefits. While Rio Grande Project water is stored at both Reservoirs, it is used for extensive public recreation provided by the New Mexico State Parks Division under a long-term lease with the Bureau of Reclamation. A full analysis of the value of foregone recreation caused by any water use restrictions must be compared to the value of the marginal habitat provided. R3

The federal Farmland Protection Policy Act requires FWS to evaluate the effects of any proposed action upon the conversion of farmland to nonagricultural uses. Restrictions on water and land uses caused by critical habitat designation will accelerate the transition of H55

prime farmlands in Southern New Mexico to development or other nonagricultural uses. Also, NEPA requires the coordination of federal planning efforts with those of the states and local governments. Every state and local land use and water use plan in Southern New Mexico gives the preservation of farmland the highest priority. Any federal efforts should do likewise. The FPPA defines "unique farmland" is that which produces "high-value food and fiber crops", such as tree nuts and vegetables. The New Mexico portion of the Rio Grande Project produces a large portion of the nation's supply of chile and pecans, as well as critical seasonal supplies of lettuce, onions and other vegetables. EBID farmers generally produce these and other high-value crops. Virtually all of EBID's farmlands fall within either the "unique farmland" or "prime farmland" categories defined within this federal law. See, 7 U.S.C. §4201 (c). These important farmlands and the waters that feed them should not be sacrificed in order to support non-essential habitat for the SWF, because their value outweighs any habitat value.

EBID wants to emphasize the need for FWS to make complete and thorough analyses of the effects of designating critical habitat in areas that impact EBID's constituents and operations. FWS' prior history has been to understate the economic and social effects of these designations for threatened and endangered species. Only a thorough analysis will suffice for FWS to comply with its duty to exclude an area where "the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat". 16 U.S.C. §1533 (b)(2).

These comments are submitted by:

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